IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC95506

FOURTH DISTRICT CASE NO. 97-2256

CEDRIC FRASER,

Petitioner/Appellant

v.

FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Respondent/Appellee.
_____/

AMENDED REPLY BRIEF OF APPELLANT

ON REVIEW FROM A DECISION OF

THE FOURTH DISTRICT COURT OF APPEAL

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ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE RADICALLY ALTERS THE JURISPRUDENCE OF FORFEITURE BY SHIFTING THE BURDEN OF PROOF TO THE CLAIMANT THROUGH AN UNWARRANTED EXPANSION OF THE REQUIREMENTS OF STANDING

I. THIS COURT WAS CORRECT IN ACCEPTING CONFLICT CERTIORARI.

Although the Florida Department of Highway Safety and Motor Vehicles has not challenged this court's acceptance of certiorari based on conflict, the brief filed by amicus curiae does. This court was correct in deciding to accept conflict certiorari in this case for the following reasons:

Fraser v. Department of Highway Safety and Motor Vehicles, 727 So.2d 1021 (Fla. 4th DCA 1999) definitely conflicts with Munoz v. The City of Coral Gables, 695 So.2d 1283 (Fla. 3rd DCA 1997). This conflict is apparent on two levels. Munoz, Id., does not create a two-tier standing requirement as does Fraser, Id., when read in conjunction with City of Fort Lauderdale v. Baruch, 718 So.2d 843 (Fla. 4th DCA 1998).[1] Munoz, Id. declares it would only be necessary for standing if a claimant came

[1] Amicus curiae suggests Appellant has not briefed this issue. Appellant draws attention to footnote four on page six of his brief where he suggests by adopting his position it would eliminate and overrule City of Fort Lauderdale v. Baruch, Id.

forward with sworn proof of a "possessory and/or ownership interest." The Fourth District Court of Appeal's opinion in Fraser, Id., on the other hand, would require proof of an ownership interest. This, in and of itself, is a conflict as Fraser, Id., has expanded upon the Third District Court of Appeal's opinion which only required a sworn statement of possessory interest.

Munoz, Id., requires only sworn proof of an ownership or possessory interest. Fraser, Id., requires proof of bona fide obtaining of money, including bank records, corporate records, personal notes and other information which would allow the court to declare the claimant was "an innocent owner" just to achieve standing. This ruling, by far, expands the ruling in Munoz, Id., and is impermissible and creates conflict for this court to resolve.[2]

Amicus curiae brief states "...the Third District held that a claimant had not established standing based his unsworn statement that 'the money was his.'" Munoz, Id. (Amicus curiae brief, p. 4.) The holding in Munoz, Id., conflicts because Fraser did sign a sworn statement saying the money was his which satisfied the requirement in

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[2] Already, the Third District has outlined one procedure and the Fourth District another for establishing standing. The Fourth District has required two levels of standing while the Third District has not. If this court does not resolve this issue, the five district courts of appeal in this state could have five different tests for standing. Clearly, this is not the result this court would approve of as there is already conflict between the two districts.

Munoz, Id., but not in Fraser, giving rise to this conflict.

The Fourth District decision in Fraser, Id., also conflicts with the Florida Department of Law Enforcement. Amicus curiae suggests to this court Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991), does not deal with the issue of standing. While amicus curiae is correct in that the decision does not mention the word "standing," neither does the Florida Contraband and Forfeiture Statute outline a procedure concerning standing. See § 932.703 Fla. Stat. (1999). However, both Department of Law Enforcement, Id. and the Florida Contraband Statute deal with much more substantive issues, to wit, who has the burden of proof in a forfeiture case. In fact, § 932.703(6)(a) Fla. Stat. (1999), states,

"Property may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the owner either knew, or should have known, after reasonable inquiry, that the property was being employed in criminal activity." This clearly establishes the burden of production and burden of proof is on the seizing agency and not on the claimant.

This court's decision in Department of Law Enforcement, Id., places the burden squarely on the seizing agency, as it should be. Amicus curiae's brief is shortsighted in suggesting to this court because Department of Law Enforcement, Id., does not mention the word standing, that the Fraser, Id., decision of the Fourth District is not in

conflict with this court's decision.

If the Fraser, Id., opinion becomes the law of this state, the Fourth District would have clearly shifted the burden of proof from the seizing agency to the claimant in a currency forfeiture case in violation of the clear terms of Chapter 932 and creating conflict with the Florida Department of Law Enforcement.

Counsel for the claimant respectfully suggests the real issue before the court is not the issue of standing but the issue of whether or not the seizing agency can, in fact, meet its burden of proof. In its answer brief, the Department of Highway Safety and Motor Vehicles argues the following: "...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...." (Brief of Respondent, p. 17.)

If the Department had such clear and convincing evidence this would be an easy thing to do. But in cases before the court such as this one, where there is no clear and convincing evidence, standing is a convenient way for the seizing agencies of this state to turn a windfall profit by seizing large cash hordes and then demanding claimants establish where they got it from in order to contest such seizures in the circuit courts of this state.

II. BYROM V. GALLAGHER, 609 So.2d 24 (Fla. 1992).

In the decision in Byrom, Id., this court decided in order to have standing to contest titled property one must have either a titled or an equitable interest in the property. The court went on to rule this interest must be by a bona fide purchaser or owner to preclude fraudulent claims. This issue was correctly decided by the court. The court took great pains to declare its decision was limited to property which the state has required a person have title or compliance with title requirements to show ownership. (See footnote three Byrom, Id.) While this procedure is more than adequate for titled property, it is inadequate for intangible property or cash as recognized by the court in Bryom, Id. Currency is not purchased; it is either possessed and owned by its possessor, or owned by somebody else when the possessor is transporting said currency. The federal courts have allowed possessors of currency to make claims in forfeiture cases for years. United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051 (9th Cir. 1994).

In addition, federal courts have liberally construed standing issues to insure "controversies are decided on the merits" United States v. One Urban Lot, 885 F.2d 994, 1001 (1st Cir. 1989); United States v. $80,760.00 in U.S. Currency, 781 F.Supp. 462 (N.D. Texas, Fort Worth Div., 1991).

Gilbert Law Summaries Pocket Size Law Dictionary defines bona fide as, "In

good faith; honest; without deceit. A bona fide possessor is one who holds property with the honest belief that he is the proper proprietor." Byrom, Id., required a bona fide purchaser or owner. Currency situations call for bona fide possessors or owners to be claimants in forfeiture proceedings.

Cedric Fraser has submitted a sworn affidavit he is the owner of the money, has testified at a deposition he earned the money and the money properly belongs to him. These sworn statements constitute evidence and are made under penalty of perjury. These are enough to place the case at issue.

The threshold issue of standing requires an injured party be before the court. Fraser is claiming to be the injured party which confers standing upon him. Unless and until the state or the seizing agency comes forth with proof Fraser is not a "bona fide" owner of the currency, the litigation should go forward. 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). The Illinois Act provides "only an owner or interest holder in the property may file an answer asserting a claim against the property in the action *in rem*." 725 ILCS 150/9(c) [West 1994]. The Florida Statute § 932.701(2)(h) states, "'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." The Florida definition and the Illinois

definition are remarkably similar. In interpreting the Illinois statute, the Supreme Court of Illinois ruled,

> It is the state's burden to challenge the claimant's standing to contest the forfeiture. Furthermore, the state may successfully satisfy this burden **only** [emphasis added] where the state can prove that the claimant has not suffered an injury in fact to a legally causable interest. In addition, the legally causable interest should be construed broadly to include any recognizable legal or equitable interest in the property seized. S.Rep.No. 225 98th Congress 2nd Session 215 (1984).

This is the same standard this court should adopt.[3] Therefore, claimant's position is entirely consistent with the outlines in Byrom, Id., and notes in Byrom, Id., the court put no requirement on claimants as to where or how they obtained the property or their interest in it, only that they had a rightful interest in the property. This should be the same standard in currency forfeiture cases. How and when claimants obtained the property is not the standard which should be used to determine whether or not a claimant has standing. Those facts should be developed and litigated at trial, and go to the issue of whether or not claimants are innocent owners.

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[3] Although respondent's brief, pages 24-25, argues the Illinois Act does not place any initial burden on the claimant to prove his interest in the property, the language for filing a claim is remarkably similar to that of Florida. It is the Illinois Supreme Court who was asked to interpret this language, and they did so by deciding no initial burden is to be placed on the claimant other than asserting an ownership interest in the property seized. The Florida Contraband Act outlines **no** procedure for making a claim in intangible property and, thus, claimants must rely on this court to outline said procedure in accordance with constitutional principles.

One can be a bona fide owner of currency which might be subject to seizure. The ultimate issue of whether or not the seized currency will be forfeited is what the trial is for, not the issue of standing.

III. CIRCUMSTANCES UNDER WHICH THIS CASE ARISE.

Counsel for amicus curiae includes a portion of his brief entitled, "The circumstances in which these cases arise" outlining cases talking about laundered money and employees known as "smurfs" pick up cash from drug dealers in Florida (Amicus Curiae brief, p. 7). The case before the court has nothing to do with those types of issues and is merely included in amicus curiae's brief in a blatant attempt to prejudice this court into believing allowing Cedric Fraser standing in this case is somehow akin to approval of the drug trade. The illicit drug trade or dealing in cash, although deplorable, should not substitute for due process and good solid legal analysis. The evils described by amicus curiae in this section of their brief seem to allow situation where smurfs or couriers are protecting third parties. This situation is not analogous to the matter before the court as Cedric Fraser is a third party who is rightfully making his claim to currency in a car that had previously been in his garage and which he said he placed there. The court should reject these arguments by amicus curiae, although acknowledging the drug trade is deplorable.

The procedure advocated by the state would allow for windfall profits to the

seizing agencies and to the state of Florida, denying due process to lawful claimants without ever giving them their day in court or putting the state to its burden of proof. Such is not the role of government and such procedure should not be sanctioned by this court.

IV. THE MERITS OF THE CLAIM ESTABLISH FRASER HAS STANDING.

Both amicus curiae and the Florida Department of Highway Safety and Motor Vehicles in their briefs take the position a claimant cannot establish standing by merely making a sworn statement the currency is his. Why not?

Amicus curiae draws analogies to negligence cases and states a claimant cannot defeat a summary judgment by merely stating the defendant was negligent. The proving of negligence requires establishing elements. The establishment of one's right to make a claim merely involves alleging he has been injured by the government's actions.

Of course, a claim such as this should be allowed merely by stating the money is mine. What evidence can the state offer the money is not Cedric Fraser's?

The real issue in a forfeiture case is whether or not the state can establish by clear and convincing evidence the money was involved in wrongdoing. If the state can ultimately establish and meet its burden of proof, the issues of standing evaporate as the state's proof mounts. Only in a case where the state cannot meet its ultimate

burden of proof will the cry go up the claimant has no standing. This allows windfall profits to the seizing agencies and to the state of Florida, and a strict and narrow definition of standing would allow forfeiture of monies without any hearing being afforded. This the court should not tolerate.

Fraser has come forth with sworn statements of ownership, sworn testimony of when and how the car was in his garage, and when he placed the money in the car. This should be enough.

Counsel for amicus curiae misinterprets Fraser's arguments reference the Fifth Amendment. Fraser only means to suggest if he invokes his Fifth Amendment privilege as to where and how he got the money, which have nothing to do with standing, these invocations of his Fifth Amendment right should not be used against him in determining his standing.

Whether or not the invocation of the Fifth Amendment should be used against Fraser in the case on the merits is a different question entirely. Counsel suggests and agrees with amicus this issue is not necessarily ripe for presentation before the court.

V. REFUTING DEPARTMENT'S ARGUMENTS REFERENCE THE PETITIONER'S CLAIM OF STANDING.

The Department argues the claimant's argument in his brief suggests a standing threshold requirement violates the Constitution. "Therefore, according to Petitioner,

making standing a threshold requirement violates the Constitution." (Brief of Respondent, p. 18.)

The claimant's position is not requiring the claimant to establish standing violates the Constitution, it is simply the burden of proof placed upon the claimant to establish his standing by the Fourth District Court of Appeal violates the Constitution by impermissibly shifting the burden of proof from the seizing agency to the claimant just to establish standing. This is not the law as set down by this court in Department of Law Enforcement v. Real Property, Id., and should never be the law as forfeitures are never favored at law, and the standing requirement for claimants in forfeiture cases should be a low threshold.

In following up the faulty reasoning outlined in the respondent's brief, the Department states, "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 Respondent, p. 18.) This has never been Fraser's position. The controversy before this court is not whether or not a claimant should have to establish his standing but what should be the measure of proof to establish his standing. Should it be as the Department contends, and the Fourth District now requires, the claimant come forward with proof of innocent ownership to establish his "bona fide" interest in the property, or should it be a far lesser standard allowing claimants access to the courts and due

process? Commonsense, logic, and good legal reasoning dictate the latter and not the former.

VI. DISTINGUISHING CLAIMANTS POSITIONS.

In its response brief, the Department argues, "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." (Brief of Respondent, p. 24.)

In the case before this court there are no other claimants and Fraser has established he has "a bona fide interest in the funds." This should be the legal standard in Florida, not the requirement of bona fide purchaser. One does not purchase funds; one has an interest in funds. Either the funds are lawful or they are unlawful. One's interest in the funds is not determined by the lawfulness or unlawfulness of the funds themselves. This court must remember a forfeiture action is an in rem action against "the thing." Thus, the money before the court may be illegal but one's interest in the money is not illegal, therefore, claimant should only have to establish a bona fide interest in the funds, and this should be able to be accomplished by filing sworn statements of an ownership interest or possessory

interest in the funds.[4] United States of America v. $191,910.00 in U.S. Currency, Id. at 1057, distinguishes Mercado v. U.S. Customs Service, 873 F.2d 641 (2nd Cir. 1989), which is a case the appellees rely on heavily.

The Brief of Respondent has a section entitled "Petitioner's position is inapplicable and unworkable." (Brief of Respondent, p.26.) Counsel for the Department of Highway Safety and Motor Vehicles has completely misconstrued claimant's position in this regard and his tortured hypothet is confusing at best.

Counsel for the claimant has never suggested that one who initially denies ownership of the funds should then be allowed to claim the funds. Mr. Fraser has consistently claimed he is the rightful owner of the funds, has never denied ownership of said funds and has maintained that position throughout the course of this long litigation.

Again, the Department came back to its central theme in this matter in its response brief and on page 27 states, "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?" (Brief of Respondent, p.27.)

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[4] It should be noted, in the court's original granting of summary judgment for Fraser, the court noted there was a pending tax lien against the money should Fraser collect, indicating the IRS deemed Fraser had an interest in the money.

Of course not. The heart of the issue is it is not the number of claimants which cause the problem, it is only the lack of evidence that causes the problem.

The statute contemplates there could be more than one claimant and if the Department fails in its burden of proof, it would be for the court to determine how to return the money and to whom to return the money. This happens in other situations in the law on how to divide monies implead to the court. There is nothing unusual about this situation nor should there be an exception made for seizing agencies in this state.

CONCLUSION

It is hereby respectfully submitted by the claimant/appellant in this case, Cedric Fraser, the great weight of authority in determining standing supports his position and this court should be inclined to allow standing in currency forfeiture cases upon a sworn statement of ownership or possessory interest. Of course, this statement should be "bona fide," meaning it should be made in good faith and without deceit.

If the state has evidence such a sworn statement is not made in good faith it can come forward with appropriate motions to dismiss or motions for summary judgment. It also should be noted at this juncture, if one makes a false statement under oath in a legal proceeding, one can be prosecuted for it. This provides adequate remedy to the state to prevent fraudulent claims from being filed. By the same token, it allows access

to the courts and due process to litigants in the state of Florida in cases such as this.

Appellant respectfully suggests his position is grounded in commonsense, due process and the great weight of legal authority. This court should reverse the lower court and establish standing requirements allowing for open access to the courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been mailed on August , 2000, to: Charles Fahlbusch, Assistant Attorney General, 110 S.E. Sixth Street, 10th Floor, Fort Lauderdale, FL 33301; and, Robert S. Glazier, Esq., 25 S.E. 2nd Avenue, Suite 1020, Miami, FL 33131.

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