

# CASENOTES

## **Civil Drug Forfeiture; The Supreme Court Reins in Government's Power to Seize Property From "Innocent Owners" and Reconciles Conflicting Subsections of Section 881**

In *United States v. A Parcel of Land, Buildings, Appurtenances & Improvements, Known as 92 Buena Vista Avenue*,<sup>1</sup> ("Buena Vista"), the Supreme Court reconciled two seemingly conflicting subsections of a statute used by the government to confiscate proceeds of illegal drug trafficking.<sup>2</sup> The conflict between the two subsections became apparent

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1. *United States v. A Parcel of Land, Buildings, Appurtenances & Improvements, Known as 92 Buena Vista Avenue*, 113 S. Ct. 1126 (1993).

2. The statute, 21 U.S.C. § 881 (1988), is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 as amended in 1986.

Subsection (a) provides for the seizure and forfeiture of all proceeds traceable to illegal drug transactions but provides an exception for innocent owners:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys . . . or other things of value furnished . . . by any person in exchange for a controlled substance in violation of [21 U.S.C. §§ 801-904] and all proceeds traceable to such an exchange . . . except that no property shall be forfeited under the paragraph, to the extent of the interest of an owner, by reason

after the government seized the respondent's home, contending the money given to her years earlier to purchase it was traceable to illegal drug transactions.

From 1981 to 1987, respondent was the girlfriend of Joseph Brenna, later determined to be a drug trafficker. In 1982 Brenna gave respondent approximately \$240,000 to purchase a home for herself and her three children. In 1989, the Government filed an in rem action against the property, alleging that respondent purchased it with proceeds from illegal drug trafficking.<sup>3</sup> Although the government had probable cause to believe the funds used to buy the house were proceeds of illegal drug trafficking, the respondent, who held sole title to the property, swore she had no knowledge of the money's origins. Respondent asserted a claim to the property and the district court granted her the right to defend the action. She filed a motion for summary judgment on the grounds she was an "innocent owner" within the meaning of section 881(a)(6).<sup>4</sup> The district court rejected her defense for two reasons. First, it ruled that the innocent owner defense may only be invoked by a "bona fide purchaser for value."<sup>5</sup> Second, the court interpreted the statute to allow use of the innocent owner defense only by persons acquiring the property interest before the act giving right to forfeiture.<sup>6</sup> The court allowed respondent to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).<sup>7</sup> The Third Circuit Court of Appeals considered whether "an innocent owner defense may be asserted by a person who is not a bona fide purchaser for value concerning a parcel of land where the government has established probable cause to believe that the parcel of land was purchased with monies traceable to drug proceeds."<sup>8</sup> The Third Circuit decided that the innocent owner defense was not limited to bona fide purchasers for value. It also ruled that it was not necessary for respondent to have acquired her interest in the property prior to the act giving rise to

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of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The conflicting subsection (h) codifies the relation back doctrine and has been applied by courts to divest even innocent owners of property purchased with illegal drug transaction proceeds who came into possession of the property after the illegal act:

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(emphasis added).

3. 113 S. Ct. at 1130.
4. *Id.*
5. 738 F. Supp. 854, 860 (N.J. 1990).
6. *Id.*
7. 28 U.S.C. § 1292(b) (1988).
8. 742 F. Supp. 189, 192 (N.J. 1990).

forfeiture in order to use the innocent owner defense.<sup>9</sup> The Third Circuit then remanded the case to the district court to determine whether respondent was an innocent owner.<sup>10</sup> Because the Third Circuit's holding created a split among circuits,<sup>11</sup> the United States Supreme Court granted certiorari.<sup>12</sup> The Supreme Court, in affirming the Third Circuit, focused on the juxtaposition of the statute's innocent owner provision in subsection (a) and the relation back doctrine in subsection (h). The Court held that a person claiming to be an innocent owner must be given a chance to assert the defense during the forfeiture hearing. Only if the defense failed and the court found the person not to be an innocent owner could the government apply the relation back doctrine to divest the current owner of title. The title would then "relate back" to the time of the illegal drug deal and vest in the government.<sup>13</sup>

The earliest forfeiture laws enacted by the First Congress authorized the seizure of property used in commission of customs offenses<sup>14</sup> and piracy<sup>15</sup>. Later forfeiture laws allowed the seizure of distilleries and other property used to defraud the government of tax revenues from the sale of alcoholic beverages.<sup>16</sup> None of these early statutes made an exception for the innocent owner because the government's right to seizure was based on the misuse of the property.<sup>17</sup> These early statutes provided only for seizure of the fruits and instrumentalities of the crime and contraband that "the private citizen was not permitted to possess."<sup>18</sup> It was not until 1967 that the United States Supreme Court, in *Warden v. Hayden*,<sup>19</sup> held that under the Fourth Amendment<sup>20</sup> there "is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."<sup>21</sup> This decision expanded governmental power to include seizure

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9. 937 F.2d 98, 101-102 (3d Cir. 1991).

10. *Id.* at 105.

11. 113 S.Ct. at 1131. See *In Re One 1985 Nissan*, 889 F.2d 1317 (4th Cir. 1989) (relation back used to reject claim of murdered drug dealer's heirs); *Eggleston v. Colorado*, 873 F.2d 242, 245-48 (10th Cir. 1989) (relation back used to reject claim of sales tax lien).

12. 113 S. Ct. at 1131.

13. *Id.* at 1136-37.

14. See, e.g., 1 Stat. 39, 47, §§ 12, 36; 1 Stat. 157-59, 161, 163-64, 176, §§ 13, 14, 22, 27, 67.

15. See *The Palmyra*, 12 Wheat 1, 8 (1827).

16. See, e.g., *United States v. Stowell*, 133 U.S. 1, 11-12, (1890).

17. 113 S. Ct. at 1133.

18. *Id.* at 1133 n.15.

19. 387 U.S. 294, 303-304 (1967).

20. U.S. CONST. amend. IV.

21. 387 U.S. at 310.

and forfeiture of "mere evidence."<sup>22</sup> In 1974 the Supreme Court recognized a need "to protect innocent interest holders"<sup>23</sup> and proclaimed an exception to forfeiture in the landmark case *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>24</sup> In *Calero*, the lessor of a yacht challenged a Puerto Rican forfeiture statute<sup>25</sup> when the government seized the yacht after the lessees used it to transport marijuana. Although the Court found the statute constitutional, it established a two-pronged test in dictum for an innocent owner exception: A claimant would have to prove that he was uninvolved and unaware of the illegal activity, and also that he had done all that could reasonably be expected to prevent the illegal use of his property.<sup>26</sup> In 1978 Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>27</sup> to provide for the seizure and forfeiture of *proceeds* of illegal drug transactions.<sup>28</sup> Again governmental power was expanded, now to include not only fruits, instrumentalities, contraband, and evidence, but also proceeds.<sup>29</sup> In subsection (a) of the statute, a "novel protection for innocent owners" tempered this unprecedented move as Congress followed the lead of the Supreme Court in *Calero*.<sup>30</sup> However, courts called upon to interpret the statute frequently divested owners who were innocent of any wrongdoing by applying the common law doctrine of "relation back." This doctrine creates the legal fiction that the title to property subject to forfeiture vests in the government retroactively to the time an illegal drug deal took place, with the ensuing civil proceeding merely perfecting the government's title.<sup>31</sup> Congress codified relation back in 1984 when it again amended Section 881, adding subsection (h).<sup>32</sup> In deciding cases after the amendment, the courts used the relation back subsection to preclude the innocent owner defense when

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22. *Id.*

23. Patricia M. Canavan, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 494-95 (1990).

24. 416 U.S. 663 (1974).

25. P.R. LAWS ANN. tit. 24 § 2512 (1979 & Supp. 1988). The applicable provisions provide for forfeiture of "all conveyances . . . which are used . . . to transport [contraband]."

26. 416 U.S. at 688-90.

27. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-970 (1988)).

28. Pub. L. No. 95-633, 92 Stat. 3777 (codified as amended at 21 U.S.C. §§ 881(a)(6) (1988)).

29. 113 S. Ct. at 1133-34.

30. *Id.* at 1134.

31. Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1259 (1989).

32. 21 U.S.C. § 881(h). See *supra* note 2.

the claimant acquired the property subsequent to the illegal activity.<sup>33</sup> In *In re One 1985 Nissan*, the Fourth Circuit used the relation back doctrine to reject the claims of a murdered drug trafficker's heirs to his property.<sup>34</sup> That court reasoned that the forfeiture provisions of 21 U.S.C. § 881 did not "abate on the death of the property's owner" since the purpose of the statute was remedial rather than punitive.<sup>35</sup> Further, the court held that the relation back doctrine of subsection (h) applied to vest "all right, title and interest in the property . . . at the time the proceeds involved or traceable thereto were generated by illegal drug sales."<sup>36</sup> Since the government already owned the property, the drug trafficker "had no interest in the property to pass to his estate or heirs."<sup>37</sup> Similarly, in the case of *United States v. One Parcel of Real Estate Property*,<sup>38</sup> the Fifth Circuit precluded a titled owner of real estate from asserting the innocent owner defense because he obtained his property interest subsequent to the illegal act giving rise to forfeiture.<sup>39</sup> The court ruled that since forfeiture actually occurred at the moment of the illegal act, no third party could acquire a legally cognizable interest in the property after that date. A governmental condemnation relates back to the time of the wrongful act and voids all intermediate sales and alienation.<sup>40</sup> The Tenth Circuit, in *Eggleston v. Colorado*,<sup>41</sup> rejected a state department of revenue's claim to sales tax liens under an innocent owner defense using the relation back doctrine.<sup>42</sup> The court in *Eggleston* held that "forfeiture occurs before any property interest in a sales tax 'trust' arises. The innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis of the forfeiture."<sup>43</sup>

In *Buena Vista*, the Supreme Court overturned previous lower court decisions on point when it affirmed the Third Circuit's decision that the relation back doctrine did not preclude the respondent's claim even though she obtained the property after the illegal act took place. The Supreme Court rejected the government's argument that an "owner"

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33. Beverly L. Jacklin, Annotation, *Who is Exempt From Forfeiture Under "Innocent Owner" Provision of 21 USCS § 881(a)(6)?*, 109 A.L.R. FED. 322, 327 (1993).

34. 889 F.2d 1317 (4th Cir. 1989).

35. *Id.* at 1319.

36. *Id.*

37. *Id.*

38. 660 F. Supp. 483, *aff'd on other grounds, remanded*, 831 F.2d 566 (5th Cir. 1987).

39. 660 F. Supp. at 487.

40. *Id.*

41. 873 F.2d 242 (10th Cir. 1989).

42. *Id.* at 248.

43. *Id.*

under the statute could only be a bona fide purchaser for value.<sup>44</sup> The Court relied on the text of the statute, in which the term "owner" is used three times "and each time it is unqualified."<sup>45</sup> The Court held this language "sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers."<sup>46</sup> The government, however, argued that the respondent never became an "owner" because the relation back doctrine "vested ownership in the United States at the moment when the proceeds of [the] illegal drug transaction were used to pay the purchase price."<sup>47</sup> In rejecting this contention, the Court examined the two conflicting subsections of the statute<sup>48</sup> and observed that "the Government's submission would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited."<sup>49</sup> The Court found it "unlikely that Congress would create a meaningless defense."<sup>50</sup> Further, "a logical application of the Government's submission would result in the forfeiture of property innocently acquired by persons who had been paid with illegal proceeds for providing goods or services to drug traffickers."<sup>51</sup> In an examination of the relation back doctrine, the Court found it clear that "under the common law rule the fictional and retroactive vesting is not self-executing."<sup>52</sup> The government must file an in rem action and obtain a judgment before forfeiture, and relation back of title, takes place.<sup>53</sup> This led the Court to determine that "[u]ntil the Government does win such a judgment, however, someone else owns the property. That person may therefore invoke any defense available to the owner of the property before the forfeiture is decreed."<sup>54</sup> The Court then analyzed subsection (h), which applies the relation back doctrine to "property described in subsection (a)."<sup>55</sup> In response, the government contended that since property described in subsection (a) includes *proceeds* traceable to illegal drug actions, subsection (h) "has the effect of preventing such proceeds from becoming the property of anyone other

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44. 113 S. Ct. at 1131.

45. *Id.* at 1134.

46. *Id.*

47. *Id.*

48. 21 U.S.C. §§ 881(a)(6) and (h).

49. 113 S. Ct. at 1135.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1136.

54. *Id.*

55. 21 U.S.C. § 881(h).

than the United States.<sup>56</sup> The Court, however, construed the two subsections differently in light of the common law rule that retroactive vesting is not self-executing,<sup>57</sup> finding that “[a]lthough proceeds subject to § 881(h) are ‘described’ in the first part of subsection (a)(6), the last clause of that subsection exempts certain proceeds—proceeds owned by one unaware of their criminal source—from forfeiture.”<sup>58</sup> The Court relied on the Senate Report on the 1984 amendment, which specified that subsection (h) applies only to “property which is subject to civil forfeiture under section 881(a).”<sup>59</sup> Accordingly, the Court concluded that “[u]nder § 881(a)(6), the property of one who can satisfy the innocent owner defense is not subject to civil forfeiture.”<sup>60</sup> Therefore, the Court held that “[b]ecause the success of any defense available under § 881(a) will necessarily determine whether § 881(h) applies, § 881(a)(6) must allow an assertion of the defense *before* § 881(h) applies.”<sup>61</sup> A claimant, then, must be allowed to assert any available defenses under the statute, including the innocent owner defense, in the forfeiture hearing. If the defense is successful, the property is not subject to forfeiture; but if the defense is unsuccessful, the title to the property vests in the government retroactively to the date of the illegal act giving rise to forfeiture.<sup>62</sup>

The Supreme Court’s decision in *Buena Vista* imposes limitations on the government’s wholesale use of Section 881 to confiscate property purchased with proceeds of illegal drug trafficking. After *Buena Vista*, even an owner who is not a bona fide purchaser, and who acquired the property subsequent to the illegal act, must be given a chance to assert an innocent owner defense in a forfeiture hearing. To prevail, the owner must prove ignorance of the illegal source of the funds used to buy the property. If the defense is successful, the government cannot divest the owner and claim title relating back to the time the owner used the illegally obtained money to buy the property.

In his dissent, Justice Kennedy denounced the plurality’s holding as applied to the recipient of a gift. He claimed the ruling was counter to the legislative intent “to lessen the economic power of drug enterprises.”<sup>63</sup> Justice Kennedy contended that a criminal who transfers drug

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56. 113 S. Ct. at 1136.

57. See *supra* note 49.

58. 113 S. Ct. at 1136.

59. S. Rep. No. 98-225 (1983), U.S. Code Cong. & Admin. News 3398.

60. 113 S. Ct. at 1136-37.

61. *Id.* at 1137.

62. *Id.*

63. 113 S. Ct. at 1145 (Kennedy J., dissenting) (quoting *Caplin & Drysdale v. United States*, 492 U.S. 617, 630 (1989)).

transaction proceeds to a good faith purchaser for value presumably does so "because he considers what he receives from the purchaser to be of equal or greater value than what he gives to the purchaser."<sup>64</sup> Thus, "the criminal's economic power is diminished by seizing from him whatever he received in the exchange with the good faith purchaser."<sup>65</sup> Allowing the criminal to transfer ill-gotten gains to another for no value in return thwarts this purpose because "the criminal's economic power cannot be diminished by seizing what he received in the donative exchange, for he received no tangible value."<sup>66</sup> Kennedy claimed the government will not be able to "drain the criminal's economic power" unless it is able to "pierce donative transfers and recapture the property given in the exchange."<sup>67</sup> This, in his opinion, "rips out the most effective enforcement provisions in all of the drug forfeiture laws."<sup>68</sup>

Although Justice Kennedy's warnings have some validity, it is unlikely that the effect of the plurality's holding will be as dire as he predicts. While it is true that some property will be exempted from forfeiture because it has been transferred by a drug trafficker to an unsuspecting third party, a transfer for no value has little or no impact on the drug trafficker's economic power. There is no "property given in the exchange" to recapture.<sup>69</sup> The only property to be seized is that belonging to the innocent owner. The real justification for the plurality's holding is that Congress did not want to take property away from innocent owners. This hurts the innocent owner and not the drug trafficker. The holding in *Buena Vista* leaves mechanisms in place to deal with instances when the transfer is but a sham and the recipient a "straw man."<sup>70</sup> As to the relation back doctrine, the plurality's holding in *Buena Vista* is in accord with the mandate of due process, "an opportunity to be heard at a meaningful time and in a meaningful manner."<sup>71</sup> The decision that a claimant must be allowed to assert the innocent owner defense before the government will be allowed to retroactively claim title to property merely assures that a claimant will have the opportunity to be heard. The burden of proof still rests on the

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1146.

69. *See supra* note 67.

70. *See, e.g.,* *United States v. 1.678 Acres of Land*, 684 F. Supp. 426 (W.D. N.C. 1988); *United States v. Fee Simple Parcel of Real Property, etc.*, 650 F. Supp. 1534 (E.D. La. 1987).

71. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, (1965)).

claimant to prove ignorance of any knowledge that the funds used to purchase property came from an illegal drug transaction.<sup>72</sup> To hold otherwise would threaten property rights and make property ownership precarious.

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72. 113 S. Ct. at 1129.

