

In the

Supreme Court of the United States

ASTOL CALERO-TOLEDO,)
Superintendent of Police,)
et al.,)
Appellant,)
v.)
PEARSON YACHT LEASING CO.,)
Appellee.)

No. 73-157

Washington, D. C.

January 7, 1974

Pages 1 thru 41

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Superintendent of Police, :
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Appellants, :
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v. : No. 73-157
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PEARSON YACHT LEASING CO., :
:
Appellee. :
:
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Washington, D. C.,

Monday, January 7, 1974.

The above-entitled matter came on for argument at
10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LYNN R. COLEMAN, ESQ., 1701 Pennsylvania Avenue,
N. W., Washington, D. C. 20006; for the
Appellants.

GUSTAVO A. GELPI, ESQ., P. O. Box 2407, Old San
Juan, Puerto Rico 00903; for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 73-157, Calero-Toledo against Pearson Yacht Leasing Company.

Mr. Coleman, you may proceed whenever you're ready.

ORAL ARGUMENT OF LYNN R. COLEMAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. COLEMAN: Mr. Chief Justice, and may it please the Court:

My name is Lynn Coleman. I appear as Special Counsel for the Commonwealth of Puerto Rico, both of the appellants in this case being officials of the Commonwealth.

This is an appeal from a decision of the District Court of Puerto Rico, sitting as a three-judge court, which declared unconstitutional a portion of the Controlled Substances Act of the Commonwealth, as well as the Uniform Seizure and Forfeiture Statute of the Commonwealth.

The ground for this decision was that these provisions were unconstitutional on their face, in that they failed to provide for notice and an opportunity for hearing prior to a seizure in connection with the forfeiture proceeding, and that, from the substantive standpoint, they provided for the taking of the property of a person who is innocent of the crime for which the property was seized. And the court, in so holding, relied on two fairly recent

decisions of this Court, Fuentes vs. Shevin, and Coin and Currency.

The particular -- a brief statement of the facts involved would be that the Pearson Yacht Leasing Company leased a yacht to a man named Olson, which in our brief we have referred to as the lessee. The lease is, in many respects, similar to a conditional sale, in that the lessee would enjoy full possession of the vessel. The lease was for a five-year term. The lessee had the obligation to pay rent. That obligation would not cease in the event anything happened to the boat, specifically indicating that forfeiture would be one of the events which would not interrupt the lessee's obligation to pay rent. The lessee had to insure the interest of the lessor against all eventualities. The lessee was obliged to use the boat only for lawful purposes, and the like.

It contained provisions which you would expect to find in a conditional-sale contract, or in a conventional mortgage, if the seller of the product had elected to allow his vendee to take title and instead reserve a purely security interest.

QUESTION: Are you suggesting, Mr. Coleman, that if there were a mortgage, if there had been a full transfer and a mortgage back, that is, the title had passed and the mortgage back, that this forfeiture would then wipe out the

underlying security?

MR. COLEMAN: I don't know whether it would have in this case, Your Honor. The court below treated the lessor as if he were the owner of the vessel and really did not examine the kind of a case which he would have, where you have parties, both of whom have some interest in the vessel.

I think that the effect of the Puerto Rican statute and many other statutes, both of the United States and other States, could be to, in a forfeiture proceeding, to forfeit effectively the interest of a mortgagor.

QUESTION: Isn't it right in this case, Mr. Coleman, the lessee could buy the thing for a dollar at the end of --

MR. COLEMAN: Yes, one dollar at the end of five years; that's true.

QUESTION: Which is virtually indistinguishable from a conditional sale.

MR. COLEMAN: I think that's true.

In any event, the lessee was found in possession of marihuana. Presumably he was arrested and criminal proceedings were instituted against him.

Some time after that discovery of marihuana on the vessel it was seized pursuant to the statute. The statute operates in this way: there must be a determination by a high

government official, either the Superintendent of Police for the entire island, the Attorney General of the Department, or the Secretary-Treasurer in Puerto Rico, that there has been an offense for which the property becomes forfeitable.

The offense is described in the Controlled Substances Act.

Process is issued by such officer, and, pursuant to that, the vessel is seized without notice. Within fifteen days -- immediately, notice is to be given within -- and it's to be given to all owners, all persons who are known to have an interest. Within fifteen days they can challenge the seizure and forfeiture by instituting proceedings in the Commonwealth courts.

The lessee was notified. He was on record with the Puerto Rican authorities as the owner of the boat. The Puerto Rican authorities presumably had no knowledge of the lessor's interest.

The lessor, consequently, was not notified; did not discover the seizure and forfeiture of the vessel until some months later, when it elected to sue in federal court rather than in the Commonwealth courts pursuant to the statute.

QUESTION: Under the Puerto Rican statute could someone having a property interest in the vessel, who was not in possession of it, had registered under this Puerto Rican statute and then been notified at the time of the

forfeiture?

MR. COLEMAN: I believe so. I think that registration statute, the form which there is for registration provides for other owners. The record is really silent on that, though, Your Honor.

Before proceeding to the burden of my argument, I would like to mention one thing. The Solicitor General filed a brief in this case, which I think is a very excellent, helpful brief, this past Friday. It particularly places in perspective the impact of an affirmance of this decision on a number of Federal laws. There is one thing that I would call attention to.

On page 5 of the Solicitor's brief, in a footnote, it is stated that the statutes involved were challenged as violating both the Fifth and the Fourteenth Amendments.

The court below, in its holding, made no distinction whatsoever. It based it on due process of law, in a concept of taking without just compensation without specifying either the Fifth or the Fourteenth Amendments.

The Solicitor then says, "It has been held that, to the extent that the Constitution applies directly to the laws of Puerto Rico, they are subject to the Fifth Amendment."

A 1947 decision of the First Circuit is cited. That case does hold that, but that, of course, was before the Commonwealth was created in 1952.

We suggest that that makes a substantial difference.

Since the creation of the Commonwealth, the First Circuit has consistently declined to decide that question, as to whether the Fifth or the Fourteenth Amendment is applicable; so has this Court in the only other case to come directly from the Commonwealth to this Court, that being the Fornaris case, which was decided about three years ago.

The Commonwealth did not brief this question. We do not regard as essential to a determination in this case whether the Fifth or the Fourteenth Amendment, due process, is applicable to the Commonwealth.

It has been true and accepted for many years that due process fully applies in the Commonwealth.

QUESTION: Well, the Fourteenth could not apply, could it?

MR. COLEMAN: I'm not sure, Your Honor.

QUESTION: Well, is Puerto Rico a State?

MR. COLEMAN: Well, there can be, I think, a respectable analysis made that it is -- before the --

QUESTION: We treat it like a State for other purposes.

MR. COLEMAN: Yes.

QUESTION: We treat, in judgments of the Supreme Court of Puerto Rico, on cert, as we treat judgments of the States, but can anyone really argue that Puerto Rico is a

State?

MR. COLEMAN: Well, I would not attempt to argue it now, Your Honor. If this subject were to be gone into, we would ask leave to file a supplemental brief. I think it's very complicated.

QUESTION: Well, --

MR. COLEMAN: There are also problems with the Fifth Amendment.

QUESTION: -- would the Fifth apply? If it's a Territory, for purposes of the Constitution, and not a State --

MR. COLEMAN: Your Honor has put his finger on the point. The question is, is it a Territory?

When the Commonwealth was created, it is the view, generally, I think, of the Commonwealth, that it is no longer a Territory.

QUESTION: I know, but it's purely a congressional Commonwealth, isn't it? That's the label that was given it.

MR. COLEMAN: I don't think that would be unanimously agreed to, Your Honor.

QUESTION: I know that. I've been in Puerto Rico, and I know some of the controversy about it.

MR. COLEMAN: What I'm suggesting merely is that a proper determination of that issue would involve a very detailed analysis of the creation of the Commonwealth, it would have implications far beyond this case, where those

implications are not before the Court now. It does not appear --

QUESTION: I still, for the life of me, can't see how it can ever be a State when it's not been admitted to the Union as a State.

MR. COLEMAN: Well, it is certainly not a State of the Union.

QUESTION: It certainly isn't.

MR. COLEMAN: But, as to whether --

QUESTION: I don't see how the Fourteenth Amendment, which applies only to the States of the Union, would apply to the Commonwealth of Puerto Rico.

MR. COLEMAN: Well, I would not attempt to go into that at this time.

QUESTION: Well, does it have to be one or the other in order to sustain jurisdiction of this Court to review judgments of the Supreme Court of Puerto Rico?

MR. COLEMAN: I would assume that it would, Your Honor, but I don't know that it's necessary to decide which. It's been --

QUESTION: Well, so we really don't care which it is right now, do we?

MR. COLEMAN: I don't believe you do.

[Laughter.]

I just wanted to clarify that, since the Solicitor

has made the point.

QUESTION: Well, we haven't.

QUESTION: You mean to clarify the existence of the problem, rather than --

MR. COLEMAN: That's exactly right. I've hardly clarified it, Your Honor.

We submit that the court below's holding that notice and hearing prior to seizure are constitutionally necessary, by way of this Court's decision in Fuentes v. Shevin, was wrong. We think that that is an unauthorized extension, an undue extension of the holding.

First of all, there is a serious question whether Pearson could have standing to complain of seizure, to assert that they were constitutionally entitled to notice and hearing, assuming such a requirement were to exist, because Pearson had no possessory interest in this yacht. The yacht was in the possession of the lessee pursuant to the lease.

Under Puerto Rican law there is no change of title in a forfeiture proceeding until forfeiture occurs. True, the yacht is temporarily in possession of the Commonwealth. But we do not see that the seizure itself affected the rights of the lessor.

So we think there is a serious question of standing initially, on the merits.

QUESTION: Under the terms of the lease you say

that the seizure, as opposed to the forfeiture, didn't impair the lessee's obligation to pay rent to the lessor; so --

MR. COLEMAN: Nor did forfeiture, Your Honor.

QUESTION: Yes.

QUESTION: But the forfeiture did change the ownership, the basic ownership, and seizure did not.

MR. COLEMAN: That's true.

QUESTION: You say that during the term of the lease the lessor wasn't entitled to possession, anyway, so that the change of possession didn't affect him at all.

MR. COLEMAN: That's right.

QUESTION: And he had a hearing before forfeiture, or an opportunity for a hearing before forfeiture.

MR. COLEMAN: That's true.

QUESTION: Well, as I understand it, he had an opportunity, if he had been given notice and fifteen days; there was a fifteen-day limitation on it.

MR. COLEMAN: Of course, there's a question that's stipulated, that he was never -- that the lessor was never notified pursuant to the statute.

QUESTION: Right.

MR. COLEMAN: He obtained actual notice.

QUESTION: Within fifteen days?

MR. COLEMAN: No.

QUESTION: All right.

MR. COLEMAN: But the Puerto Rican courts have said that the fifteen days doesn't run until the person involved is actually notified.

Now, if notice pursuant to the statute is required, then he hadn't been notified yet; if actual notice would have sufficed, fifteen -- after he found out about it, more than fifteen days elapsed before he decided to go to federal court. We argue in our brief that he really is not entitled to complaint of forfeiture, either, for that reason, that he forewent the rights that the Puerto Rican statute confers upon him.

QUESTION: Well, what's --

QUESTION: You say that it's been judicially determined that that fifteen-day period doesn't begin to run until there is actual notice?

MR. COLEMAN: Until there's notice. Whether actual notice will suffice, I'm not sure.

But it may be that only notice by the Commonwealth, formal notice by the Commonwealth, pursuant to statute, will suffice.

QUESTION: Now, if that's true, the period hasn't begun to run yet.

MR. COLEMAN: That's exactly right.

QUESTION: Isn't that right?

MR. COLEMAN: Yes.

QUESTION: If one takes the strictest possible view of the Puerto Rican forfeiture statute, that is that it forfeits the interest of a totally innocent owner upon compliance with the statute recognition, what substantive arguments could a person in Pearson's position make at this hearing?

MR. COLEMAN: They would be restricted to arguing that either the crime wasn't --

QUESTION: That there wasn't any marihuana found.

MR. COLEMAN: That there wasn't any marihuana, or something of that nature. That's true.

We, at another point in our brief, make the point that in our view the Puerto Rican Supreme Court would have been quite free to reconsider a 1967 holding that the statute would allow the forfeiture of the property of an innocent person, and that in light of the very strong tradition in this Court of giving deference to State court determinations; and there's a particular line of cases with respect to the Commonwealth, where it appears that an extra measure of deference might be justified.

QUESTION: What does the Puerto Rican Government do to forfeited vessels? Do they sell them?

MR. COLEMAN: They have the option of selling them or retaining them for their use.

QUESTION: Do they normally just sell them?

MR. COLEMAN: I think normally they sell them.
I'm not advised of that.

QUESTION: Well, they retained this one for personal use of officials or something?

MR. COLEMAN: Actually they retained it pending the outcome of this case. In other words --

QUESTION: I know, but didn't I read somewhere that the officials are making use of it?

MR. COLEMAN: No. It's been retained, Your Honor, but I don't think it's for official use. It's a sail boat, it wouldn't be very usable by an official.

QUESTION: Unh-hunh.

MR. COLEMAN: They have not elected yet to sell it. There's no time limit in the statute on it, when they have to make that election.

To go to Fuentes vs. Shevin, in that case --

QUESTION: Before you go on, I suppose this case, in its present posture, would be the same whether they found marihuana, heroin, or machine guns that were being run to or from Cuba or --

MR. COLEMAN: That's exactly right.

QUESTION: -- whatever.

MR. COLEMAN: That's why the case is very important to the Commonwealth. The Uniform Seizure and Forfeiture statute brought together all of the seizure and forfeiture

provisions in disparate parts of the Puerto Rican Code. And declaring this statute on its face unconstitutional just puts an end to seizure and forfeiture proceedings, I think, as a practical matter, in Puerto Rico.

If you have to have notice before you can seize property in connection with a criminal matter, in leading to a forfeiture proceeding, the seizure statutes, I believe, are going to be -- have their practicality seriously impaired.

But in Fuentes vs. Shevin, this Court struck down the Pennsylvania and Florida prejudgment replevin statutes, on the ground that they authorized the taking of property, even though for a short period of time, without opportunity for notice and hearing.

There the creditor could invoke process of the State to retrieve property in the possession of another private person solely on the basis of his own affidavit, solely on the basis of an ex parte proceeding before the Clerk of the Court.

The court carefully distinguished other situations where seizure without a prior hearing was justifiable. It also carefully distinguished seizure pursuant to a warrant.

In our view, seizure under this statute, where there must be a determination by a responsible official, where there must be process issued, is very similar to seizure under a

warrant, though not the same thing.

And in Fuentes, the Court identified three criteria, which have generally been used to describe those areas where there could be seizure in advance of a hearing. That is, is there an important governmental interest served, was the first criteria; and I think that clearly is satisfied by a seizure statute, looking to forfeiture.

QUESTION: Was this vessel just stopped and boarded; is that the way this --

MR. COLEMAN: The record does not disclose that, Your Honor.

QUESTION: Well, is there any contention made that the officials had no right to go on the vessel at all?

MR. COLEMAN: I don't think so.

QUESTION: Or is it challenged that there was marihuana found or not?

MR. COLEMAN: No.

QUESTION: So, are we to assume that the vessel was properly boarded and marihuana was found, in judging this case?

MR. COLEMAN: I believe so. It's stipulated by both parties that the officials acted in pecunious compliance with the statute.

QUESTION: And the parties were arrested?

MR. COLEMAN: Yes.

QUESTION: Was there any challenge to their arrest?

MR. COLEMAN: Not on this record.

A second criteria identified in Fuentes vs. Shevin as justifying seizure without a hearing was the need for promptness. I think that obviously applies to a seizure proceeding,

The third was that there be no abdication of State power. In Fuentes, State power could be invoked solely by private persons for private gain, without any determination whatsoever of whether they were probably correct.

Here, however, there is a determination by a high government official that an offense has been committed, the property has been used in connection with a crime, and process must be issued.

We think that this case is clearly within the guidelines expressed by Fuentes, which would justify seizure without prior hearing. We think this Court's decision in 1971, in U. S. vs. Thirty-seven Photographs, would also clearly justify a seizure prior to hearing in connection with a forfeiture proceeding.

So our conclusion is that that part of the Court's decision was clearly in error.

QUESTION: Well, what if -- you don't suggest a hearing that -- no hearing at all was required?

MR. COLEMAN: No, no, no. I think a hearing, I mean

a hearing is provided by the statute. And a hearing is provided before forfeiture --

QUESTION: Yes.

MR. COLEMAN: -- can occur. And I think there is provision that the hearing be very prompt, following upon the seizure. I think that satisfies the constitutional requirements.

With respect to the Court's holding that this Court's decision in Coin and Currency is to the effect that the forfeiture provisions of the Puerto Rican law must, of necessity, be unconstitutional because they authorize the taking of a person's property who is innocent of the crime for which the property was seized. We think that is clearly in error as well.

First, as I mentioned a moment ago, there is again a standing question, because Pearson elected not to avail itself of the opportunity presented by the Puerto Rican law to, within fifteen days of notice, be that pursuant to the statute or after actual notice, to go to court and assert its rights.

We also believe that if they think that it was crucial to their rights that they be able to show that they were innocent of the crime, and that that defeat the forfeiture, that that would be a question which certainly could be litigated in the Puerto Rican courts.

The statute does not say you can take the property of one innocent of the crime. The statute is silent on that. It is presumed that it's permitted under the statute.

However, there had been two other exceptions recognized to the statute for which there is no authority in the statute itself. Those are: if the property were a common carrier; or if the property were stolen from the lawful owner. Those are --

QUESTION: But the lower court construed it as authorizing the taking of an innocent party.

MR. COLEMAN: The Puerto Rican Supreme Court had, in 1967 --

QUESTION: Yes, but in this case.

MR. COLEMAN: In this Court, the --

QUESTION: In this case; in this case.

MR. COLEMAN: That's right. And on the strength of that decision, Your Honor, this Court said that there was no other way to construe the statute.

QUESTION: Well, we're not -- are we about to disagree with them? Are you suggesting we disagree with the District Court?

MR. COLEMAN: My primary argument, of course, Your Honor, is their wrong construction, should the Court view the constitutional requirements being such that this defense must be permitted, I think that there is -- that under

the principles of construing a statute to preserve its constitutionality, they would be required to take a look at the statute, and they wouldn't of necessity have to abide by that construction.

There was an argument earlier in this case that the District Court should have abstained, to allow the court, the Supreme Court of Puerto Rico to pass first on the question.

The Commonwealth withdrew its objection to calling of the three-judge court. We are not here arguing that abstention was required, but I think that there was a duty on the Court to attempt to save the constitutionality of the statute if it thought it necessary.

But on the merits of the Coin and Currency question, we do not think that Coin and Currency reached this question at all. Justice Harlan there did say that there could be a question under the Fifth Amendment whether a statute authorizing the taking of one innocent of the crime could be squared constitutionally. He said it is not necessary to decide that question. There was specifically no overruling of the many decisions of this Court which in the past have upheld that kind of a result.

Certainly it's true that early on forfeiture of one who had entrusted his property to one who then committed a crime was justified on the ground, which this Court has

regarded as fictional, that the property was the offender.

Now, I think, though, that there's significant justification in terms of current reality that is very closely related to that fiction; and that is that the State needs to be able to attack, in effect, the capital goods of crime.

In a smuggling operation, for example, the airplane, the vessel, or the truck, or whatever, may be far more important than the individual driving it, and if -- and is an effective tool to be able to reach that vehicle.

Now, there is hardly any vehicle in the United States that is not subject to some outstanding security interest. If the State -- if forfeiture of this vessel can be defeated by an undisclosed outstanding security interest, then I think that the forfeiture statute's effectiveness would be seriously impaired.

The people in the position of Pearson have ample opportunity to protect themselves. They anticipated the risk of forfeiture, they provided for insurance, they provided for continuance of the lease payment; and it is not unfair, nor in my opinion does it violate the Constitutional requirements, that their property be taken.

QUESTION: I suppose they could have required a bond of some kind, --

MR. COLEMAN: The statute does provide for bond.

QUESTION: -- in addition to what they had here.

MR. COLEMAN: Yes, they could have.

QUESTION: Mr. Coleman, I'm confused about one thing. In your Appendix, I take it, on page 29 is the memorandum opinion and order of the court.

MR. COLEMAN: That's true.

Well, it's page 19 of the appendix accompanying the -- that's right. That's right, it is in that one, too, I believe.

QUESTION: In the Appendix.

Yet in the index part, you state that the memorandum opinion is not reprinted in the appendix.

I want to be sure that the print in the Jurisdictional Statement and what begins on page 29 are one and the same.

MR. COLEMAN: That's true.

QUESTION: So that the statement in the index is incorrect?

MR. COLEMAN: That's right. That's right, Your Honor. And I don't have an explanation for that.

QUESTION: On the other side it speaks of an appeal from the District of Massachusetts; so maybe you're even.

MR. COLEMAN: Right.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Gelpi.

ORAL ARGUMENT OF GUSTAVO A. GELPI, ESQ.,

ON BEHALF OF THE APPELLEE

MR. GELPI: Mr. Chief Justice Burger, and may it please the Court:

Before starting, I would like to point out the error in the printed brief regarding, or mentioning the District Court of Massachusetts, when it should clearly be the District Court of Puerto Rico.

There is an additional printing error on page 3 --

QUESTION: Of which document?

MR. GELPI: Of appellee's brief.

-- the fifth line from the bottom, instead of "of", the second "of", it should be "or".

And on page 9, after --

QUESTION: I'm sorry, I didn't get that one. That's page 3 --

MR. GELPI: Page 3, the fifth line from the bottom.

QUESTION: And what's the word?

MR. GELPI: It should be "or" instead of "of". That's the second "of" in that sentence.

QUESTION: Oh, I see it. Right. Thank you.

MR. GELPI: And the error is the omission of the page -- on page 9 -- to the citation of Fuentes vs. Shevin. It should be page 86.

QUESTION: What page?

MR. GELPI: Page 86.

QUESTION: 86; thank you.

MR. GELPI: The Puerto Rican statutes which the District Court declared unconstitutional facially allow the taking of an innocent man's property, thereby imposing a penalty upon one not significantly involved in a criminal enterprise.

The statutes do not afford opportunity to contest the seizure and forfeiture before it actually takes place.

QUESTION: Before the forfeiture takes place?

MR. GELPI: Yes.

Appellants have suggested that there is a difference in the statute between the actual taking and the moment of forfeiture.

The statutes do not make such a distinction. They merely provide for the forfeiture of all property which may be used or is used or has been used in connection with a criminal enterprise.

From the moment that the, in this case, Superintendent makes the determination that the property is forfeitable, the only thing that can happen is for the filing of a challenge to that forfeiture after it has been seized, and that challenge would not be of help unless the challenger happens to fall within one of the two exceptions which have been judicially permitted to that forfeiture.

QUESTION: Well, it would be upheld on a factual basis, wouldn't it, if the challenger could show that marihuana was not in fact discovered on the vessel?

MR. GELPI: I don't even think that such a showing would exempt --

QUESTION: Well, what's the point of the statute providing for any challenge, then?

MR. GELPI: That's precisely it. I don't see the point.

QUESTION: Well, there must be some point. The Legislature wasn't --.

MR. GELPI: It does exempt. It gives an opportunity in the case of a common carrier to come into court and show --

QUESTION: Well, that's by judicial decision, that a common carrier or somebody whose property was stolen and used for an illegal, to transport contraband; not covered by the statute, that's by judicial decision we've been told in the view of the courts of Puerto Rico.

MR. GELPI: Yes, sir.

QUESTION: But the statute doesn't mention anything like that. The statute does, however, provide for a challenge to the confiscation, and I suppose that that was to allow the challenger to show that marihuana in fact had not been discovered aboard the vessel, or some such other ground for opposing the seizure and forfeiture.

Now you're saying that there's not even -- that's not even permissible under Puerto Rican law; is that it?

MR. GELPI: There has been no case regarding whether that showing could be made.

Well, the fact is that once the determination has been taken by the Superintendent of Police, or even by a mere policeman, as it appears from the statute, that this vessel may be used to transport or to facilitate the transportation, concealment, or possession of marihuana, then it is subject to forfeiture as well.

There is no limitation, as I see it, from the statute which would limit the forfeiture to the case where marihuana is actually found on board.

QUESTION: Well, to be a little bit more specific: suppose that at the forfeiture hearing Pearson came in and shows, by the testimony of expert chemists, that the substance found was ground soybeans and not marihuana. Are you suggesting that that would not defeat the forfeiture?

MR. GELPI: I don't think it would defeat the forfeiture under these particular statutes.

QUESTION: Mr. Gelpi, at page 34 of the Jurisdictional Statement of your opponents, Section 1722 of the LPRA is set out, and under section (a) there it talks about how the hearing shall be conducted, and it says, towards the end of Section (a): "All questions that may arise", and I

understand it to be talking about the challenge, "shall be decided and all other proceedings shall be conducted as in an ordinary civil action."

And then it talks about appeal to the certiorari of the Supreme Court of Puerto Rico on questions of law.

That sounds to me as if it is contemplated that factual questions can be raised in this proceeding.

MR. GELPI: Oh, they could be raised. But whether that would defeat forfeiture is -- has not yet been decided.

QUESTION: Well, what's the point of providing for a hearing and adjudication of facts if the adjudication doesn't have some effect on the proceeding?

MR. GELPI: That is one of the defects of the statute, I think, which --

QUESTION: But in this case you admitted that they were transporting marihuana illegally on this vessel.

MR. GELPI: No, it hasn't been admitted. The only admission, or the only violation which appears on the record is possession of marihuana on board the vessel.

QUESTION: Illegal possession?

MR. GELPI: Well, possession under --

QUESTION: Illegal or not?

MR. GELPI: It's illegal, yes.

QUESTION: It's illegal possession and a violation of the law?

MR. GELPI: Yes.

QUESTION: And that's admitted in this case.

MR. GELPI: Yes, that is what appears to have happened.

QUESTION: So I guess it is true that in your case there's no use in having the hearing.

MR. GELPI: Exactly, because --

QUESTION: Because they'd be guilty. Right?

MR. GELPI: The lessee is guilty.

QUESTION: Right.

MR. GELPI: Now, the decision relied on Fuentes and on Coin and Currency.

Appellant's argument is based upon the lease contract between the parties of possible compensation from collateral sources and upon the alleged failure to exhaust contractual remedies and are irrelevant, in my opinion, since they were neither raised nor argued in the court below, and have no basis on the record before this Court.

Thus, the issue squarely faced is: what is the constitutional norm required for forfeiture under statutes such as these in question?

In the court below appellants relied on the facial validity of the statute, and that being the sole issue before the Court, that was the only question resolved.

Appellants' contention that the norm applicable

would be that of the probable cause as required by the Fourth Amendment, would not save the statutes, as the statutes do not impose that even that minimum requirement be observed.

For example, at the moment of seizure, which took place more than two months after the arrest of the lessee, no probable cause existed then for forfeiture.

None has been shown to have existed on the record of this case. But even if probable cause were accepted as the applicable standard, the Fourth Amendment requires that a warrant be issued.

This record does not show --

QUESTION: Do you mean for the arrest or the original seizure?

MR. GELPI: For the seizure.

Now, the record here fails to show -- oh, the only exception to the issuance of a warrant has been stated many times by this Court, and that's where exigent circumstances exist; which would justify any officer to proceed to arrest, to seize and to search.

The record here fails to show any such circumstances.

The issuance of a warrant requires a prior determination by a judicial officer, not by an officer of the Executive Branch, even though he may be a high officer, as has been pointed out by appellants. The statutes here in question, as a matter of fact, facially appear to permit that

such a determination can even be made by a mere policeman.

Now, the danger from such --

QUESTION: Do you think there was an illegal arrest there?

MR. GELPI: The record doesn't show. And I don't know whether that --

QUESTION: Well, you would have to claim it was illegal to make your present argument.

MR. GELPI: Well, Your Honor, the thing is that the statute here, the seizure in this case was for forfeiture.

QUESTION: I understand. But it was after, as I understand it, marihuana was found on the vessel.

MR. GELPI: Yes.

QUESTION: In possession of those in charge of the vessel.

MR. GELPI: Yes. That's what appears from the record.

QUESTION: Do you think that was a -- in those circumstances, do you think there would have to be a prior determination by a magistrate before an arrest could be made?

MR. GELPI: That would depend upon what the circumstances were at the time of arrest.

QUESTION: Well, we've just given you the circumstances.

MR. GELPI: If the policeman walks upon the boat and finds the person in possession using marihuana at that time, he is entitled to make an arrest.

QUESTION: Yes.

QUESTION: But you're not challenging the arrest, that's clear, isn't it?

MR. GELPI: No, I don't even know how the arrest came about, or how it was effected.

Now, appellee respectfully submits that the appropriate norm is a hybrid, consisting of a prior hearing as required by the Fifth Amendment, with notice, except in those situations where exigent circumstances are present. And even with such a prior hearing, the statutes here in question are still facially invalid, as they have been construed by the Supreme Court of the Commonwealth of Puerto Rico, since innocence is not a defense to the taking and deprivation of one's property, as long as that property was lawfully in possession of the violator.

Appellants have emphasized the need of forfeiture as an element of law enforcement. But I ask: How can the imposition of a post factum penalty deter violations unless there has been an a priori intent by the person that is being penalized?

Certainly by penalizing the innocent, the criminal is not going to be deterred. It can only force that innocent

out of business.

Now, where seizure is contemporaneous with an otherwise lawful arrest, the objectives of deterrents are obtained, and it is constitutionally defensible so long as the defense of innocence is allowed.

These statutes do not.

On the other hand, where seizure and forfeiture is remote in time from the arrest, no objective other than the imposition of a penalty upon an innocent person is attained.

If, as appellants argue, the purpose was to prevent reuse of the vessel in unlawful activities, the delay of two months in seizing the vessel is inexplicable. It merely highlights the true objective of the statutes, which is the imposition of a penalty, regardless of whether it calls upon the guilty or upon the innocent.

The norm proposed is not impossible of legislative formulation, not difficult in practical application, except where exigent circumstances are present, a hearing; and when those circumstances are present, then the needs of law enforcement would be fulfilled by the immediate seizure. But in other circumstances prior notice and hearing should be constitutionally required, and innocence should be a defense.

QUESTION: Well, if it's desire to seize contraband, wouldn't there almost always be exigent circumstances as to the seizure as opposed to the forfeiture? I mean, you're not

going to get any contraband if you notify the people that in two days you're coming aboard to seize it.

MR. GELPI: No, but the seizure of contraband, Your Honor, is precisely one of the things that may be summarily seized. Because they are illegal, per se.

Now, there's nothing illegal about a vessel or an automobile, and certainly if the seizure has to be made, the seizure of the vessel has to be made in order to prevent the escape of the arrestee or to prevent some other illegal purpose, or the destruction of the evidence, then that would be one of the exigent circumstances which would warrant the actual seizure.

QUESTION: But if it's permissible to have a statute that says a boat on which contraband is found shall itself be forfeited, then, presumably, one of the elements that the government has got to show is that the contraband was found on the boat.

Now, if they notify the lessee that in forty-eight hours they're coming aboard to see if there's any contraband on his boat, the result of that forty-eight-hour search is that it's pretty well fore-ordained, isn't it?

MR. GELPI: Well, Your Honor, if the contraband is there and has not yet been seized, that may very well be the case. But when the contraband has already been seized, and the lessee has been arrested, where is the exigent circum-

stances in requiring the seizure of the vessel when it takes place two months after the original arrest and seizure of the evidence?

QUESTION: Well, so that the boat won't be used to transport the same thing within the next half-hour. Is that a good enough answer?

QUESTION: Or, to add another alternative, that the boat won't be there when they come.

MR. GELPI: Well, the boat, in the first place, Your Honor, does not belong to the lessee. He -- I don't think he would have an interest in taking it away, since it belongs to someone else.

Now, --

QUESTION: May I call your attention to paragraph 4(a) of the lease, on page 43 of the Jurisdictional Statement, that is the paragraph that provides for insurance by the lessee, to protect the lessor against damage, loss or destruction of the equipment by any cause. Was there insurance which in fact protected the lessor for this loss?

MR. GELPI: From the record of this case, it does not appear.

Now, I have suggested in my brief that that precisely is one of the issues which should have been raised in the court below in adjudicating down below, so that this Court could then have had a proper record.

QUESTION: Well, why should that be a matter of concern, since the lessor had the right, under the lease, to demand the insurance. If he failed to do so, would that not have been his responsibility?

MR. GELPI: There is no, no, nothing on the record here to show that that insurance actually did exist. The fact -- or that the insurance itself provided for the payments in case of a forfeiture.

Now, --

QUESTION: Has the lessor in this case declared the lease terminated, and all of the rent due and payable, as is provided by the lease?

MR. GELPI: It does not appear so from the record, but that was in fact done.

QUESTION: But under the terms of the lease, the lessor now has the legal right to make a full recovery from the lessee. There's no doubt about that?

MR. GELPI: Yes.

QUESTION: All right.

MR. GELPI: It also has the right to seek repossession. As a matter of fact, as of the moment of the violation the contract was breached, and the lessor became entitled to acquire possession of the vessel.

Now, the extremely, I think, broad sweep of these particular statutes cannot be more emphatically exemplified

than by considering the fact that the possible acquittal of the alleged violator will not result in the return of the property, nor in the payment of compensation.

This circumstance, I believe, is -- not only this circumstance but this set of statutes, I believe, is way beyond what is constitutionally permissible, and the only words to describe the statute which I could find were those of Mr. Justice White in his dissent in Fuentes vs. Shevin. But to me they seem like a barbaric hangover from bygone days.

Unless the Court has any further questions -- ,

MR. CHIEF JUSTICE BURGER: I think not.

Thank you, Mr. Gelpi.

Mr. Coleman, do you have anything further?

REBUTTAL ARGUMENT OF LYNN R. COLEMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. COLEMAN: One or two things, Your Honor.

With respect to one of the last things that counsel for appellee just stated, that acquittal of the one charged with the crime would have little effect on this forfeiture.

I don't think that's reflected in this record at all, and I'm not sure that's a correct statement of the law. And I just don't think that that issue is presented with this case at all.

QUESTION: But since the forfeiture is predicated on the illegal act, it should reasonably follow that if no

illegal act is found and determined, that there couldn't be any foundation for the forfeiture.

MR. COLEMAN: That would be my view of the law, Your Honor. And I think that the Court --

QUESTION: As I understand that, though, it's not predicated on conviction, criminal conviction, is it?

MR. COLEMAN: Well, it is predicated on there being a controlled substance, in effect, used in violation of law on a particular vessel.

Now, it seems to me if there is a determination that there wasn't a controlled substance or that it wasn't on this vessel, or any of the things which would then, themselves, vitiate a conviction, that would of necessity defeat the forfeiture.

QUESTION: But it doesn't require any conviction?

QUESTION: No.

MR. COLEMAN: No, it most certainly doesn't require a conviction.

QUESTION: All it requires is proof that the substance was there, whether or not there is any prosecution; isn't that it?

MR. COLEMAN: I -- I --

QUESTION: Under the statute.

MR. COLEMAN: The statute reads that way, Your Honor.

QUESTION: Yes. I mean that's the way you would take it.

MR. COLEMAN: That's right.

QUESTION: Might you not find a situation where there was a controlled substance on a vessel, but no sufficient evidence to say that any one given individual --

QUESTION: That's right.

QUESTION: -- was in possession of the controlled substance?

MR. COLEMAN: I think that could be certainly the case, Your Honor.

Now, I would only make one other point. Appellees have suggested that what we're contending is that the Fourth Amendment, probable cause requirement applies to seizure, and then they go from that to say that, well, you should have a warrant.

Now, that is a misstatement of our contention. We say that the statute here, the way it operates, has built into it protections which are very similar to a determination of probable cause. If probable cause is required, we think that the statute and the way it was complied with satisfies it; but we do not think that there is any question of a warrant being acquired, something over and above what the statute requires. And this Court's decision in Cooper vs. California, which was cited with approval in this past term's

decision in Cady vs. Dombrowski, I think makes that crystal-clear.

With respect to the argument that, why can making the property of one who is innocent of the crime be helpful in law enforcement, I think that is self-evident.

This Court, in the Goldsmith case, which has not been overruled, said that the theory of the law is that you interpose the care of the person who entrusts his property in aid of law enforcement. Particularly when you are talking about people who are selling property or lending money, they have the ability to protect themselves against that risk, and if that risk is there they also have the motive to try to see that their property is not used in violation of law.

That is a justification for the statute.

Thank you, Your Honor.

QUESTION: I suppose, Mr. Coleman, that it has happened that a vessel, with no one on board at all, might have been found with machine guns, heroin, or other contraband, --

MR. COLEMAN: Unh-hunh.

QUESTION: -- is seized and forfeited.

MR. COLEMAN: Unh-hunh.

QUESTION: And there would be no verdict of guilt of any person, unless --

MR. COLEMAN: I think that --

QUESTION: -- they could show that the owner in some way was involved in the conspiracy.

MR. COLEMAN: I think so, Your Honor. But that is the only justification for these statutes, and the only justification for a forfeiture. I think forfeiture would be amply justified in a case of that kind, because it's evident that some one had seriously violated the law, and that that vessel had been used in that violation, and it wouldn't offend due process to take the vessel.

QUESTION: And that the vessel was the instrument of the crime.

MR. COLEMAN: I think that --

QUESTION: Even if there was no proof of who --

MR. COLEMAN: Yes.

QUESTION: -- navigated the vessel.

MR. COLEMAN: Yes. I think it's an instance of where the fiction may bear a close resemblance to reality, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

[Whereupon, at 10:54 o'clock, a.m., the case in the above-entitled matter was submitted.]