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Supreme Court of Texas.
The State of Texas, Petitioner,
v.
\$281,420.00 in United States Currency, Respondent.
No. 08-0465.

October 7, 2009.

Appearances:
Timothy A. Davis, Office of the Criminal District Attorney,
Edinburg, TX, for petitioner.
Sean D. Jordan, Office of the State Solicitor General, Austin, TX,
for amicus curiae The State of Texas, for petitioner.
Edward A. Mallett, Mallett & Saper LLP, Houston, TX, for
respondent Gregorio Huerta.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet
O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and
Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear
argument in 08-0465, the State of Texas vs. United States Currency.

MARSHALL: May it please the Court, Mr. Davis will present argument
for the Petitioner, the Petitioner has reserved five minutes for
rebuttal. The Petitioner will open for the first five minutes. Mr.
Jordan will present 10 minutes of argument for Amicus Curiae, the
Office of the Solicitor General.

ORAL ARGUMENT OF TIMOTHY A. DAVIS ON BEHALF OF THE PETITIONER

ATTORNEY TIMOTHY A. DAVIS: Thank you. May it please the Court. As
a first order I would like to say that the State, to the extent it's
represented by the District Attorney's Office in Hidalgo County, is
going to waive its first issue that's before the Court, and that's the
issue with regard to the judgment notwithstanding the verdict being
granted by the trial court level. While it's our position that we think
it was error for the trial judge not to grant the directed verdict, as
the case was charged there's really nothing for the appellate court to
reverse as far as - because there wasn't an issue submitted to the
trial court regarding whether Mr. Huerta had any type of ownership or

equitable interest in the money, so we've adopted the position of the Solicitor General, which leaves us with the case as it stands now where the Thirteenth Court of Appeals has overturned the trial court's JNOV but has awarded all of the currency at question in this case --

JUSTICE NATHAN L. HECHT: The Solicitor General doesn't think there was evidence of contraband, you still think there is?

ATTORNEY TIMOTHY A. DAVIS: Judge, I think there is. I think there's some evidence of it, but I also can understand their position that there's not enough evidence to overturn the jury's decision that it wasn't contraband. Personally I think it was, and I think --

JUSTICE DON R. WILLETT: So bottom line, you're waving the white flag on the JNOV?

ATTORNEY TIMOTHY A. DAVIS: Yes, sir. So what we're left with was a decision by the Thirteenth Court of Appeals where we have a finding where the currency wasn't contraband. The two individuals who were the owners, one of them essentially had to be the owner of the currency, Mr. Mercado or Mr. Pulido. Neither of them appeared at trial. Mr. Mercado was served personally with the petition in the case, he elected not to proceed. A default judgment was entered against him. Mr. Pulido's involvement with the case was he was the registered owner of the truck/tractor that within which the currency was seized. We were not --

JUSTICE NATHAN L. HECHT: Does the record reflect that he was served, or just is it --

ATTORNEY TIMOTHY A. DAVIS: Judge, he was served by citation by publication.

JUSTICE NATHAN L. HECHT: Oh.

ATTORNEY TIMOTHY A. DAVIS: And in accordance with the Rules of Civil Procedure, an attorney ad litem was appointed on his behalf.

JUSTICE NATHAN L. HECHT: What about Mercado?

ATTORNEY TIMOTHY A. DAVIS: Mercado was served personally.

JUSTICE NATHAN L. HECHT: Personally.

ATTORNEY TIMOTHY A. DAVIS: And never appeared in the case. Mr. Huerta who was the tow-truck driver who was towing the truck/tractor, he did intervene in the case and he asserted basically two points to the trial court and to the jury to get, I think at the trial court level, some of the money. And he was saying either he was, there was a bailor-bailee relationship between him and the owner of the money, or alternatively that there's some type of finders keepers doctrine that would entitle him to some or all of the money. With regard to the finders keepers doctrine, of course there is no basis in Texas law for a finders keepers. I think actually what he was trying to assert was sort of a treasure-trove theory saying like, "I found the money so I should get some of it or all of it." And the jury actually gave him or awarded him \$70,000 of the \$281,000. What I think Texas courts have looked at as far as when money is found or an item is found, it's either characterized as being mislaid property or property that's lost, and in this case I think the evidence is pretty clear that if anything, this was mislaid property, somebody --

JUSTICE DAVID MEDINA: Or it could have been abandoned because maybe it was drug money and nobody wanted to come forward and make a claim to it.

ATTORNEY TIMOTHY A. DAVIS: Correct. Well, I think as far as Mr. Mercado and Mr. Pulido are concerned, they obviously abandoned at least their right to contest that it was contraband. The facts of the case, it's just not a situation where Mr. Huerta came upon the money out in a field and said, "Oh, this must be, you know, some drug money that

somebody left behind." He was actually involved in removing the money from the truck and assisting the DPS and the U.S. Customs officers in removing it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Your brief said --

JUSTICE DAVID MEDINA: That seems pretty -- I'm sorry.

CHIEF JUSTICE WALLACE B. JEFFERSON: There was a point at which he was, where the examination was basically done and that he then on his own went into the tailpipe, or whatever? I mean I didn't understand that.

ATTORNEY TIMOTHY A. DAVIS: Well, I think what happened, Judge, is that the truck/tractor is being towed, and the DPS trooper makes a traffic stop on the expressway near San Juan, Texas --

CHIEF JUSTICE WALLACE B. JEFFERSON: Right, right.

ATTORNEY TIMOTHY A. DAVIS: -- and they do an inspection there on the side of the road.

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm talking about at the Customs.

ATTORNEY TIMOTHY A. DAVIS: Right. At the Customs, I think Mr. Huerta's testimony was that the Customs agents and the DPS agents were working more towards the front of the truck, he was at the back and he's the one that first found that there was something in that well-housing. I mean that's not contested. I mean --

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY TIMOTHY A. DAVIS: -- the facts are the facts. He had the tools to remove that and he did it, and he was probably the first one to even touch one of those packets.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, your time is expired. I don't know if you --

ATTORNEY TIMOTHY A. DAVIS: Yes, sir..

CHIEF JUSTICE WALLACE B. JEFFERSON: - want to let the State argue, or you can continue. It's up to you.

ATTORNEY TIMOTHY A. DAVIS: No, sir, I'll....

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, thank you.

ATTORNEY TIMOTHY A. DAVIS:...I'll let Mr. Jordan take over.

ORAL ARGUMENT OF SEAN D. JORDAN ON BEHALF OF THE PETITIONER

ATTORNEY SEAN D. JORDAN: Good morning. May it please the Court. This case presents the question of how seized property that has been made subject to a Chapter 59 Civil Forfeiture Proceeding should be disposed of after it's been determined not to be contraband, but the owner of the property remains unknown. The Court should now make clear that under these circumstances, the property should be disposed of under Article 18.17 of the Code of Criminal Procedure.

JUSTICE NATHAN L. HECHT: How often does this happen?

ATTORNEY SEAN D. JORDAN: Your Honor, it does not appear to happen particularly often. We found just a few cases, some unreported cases where property was disposed of under Article 18.17, but certainly the lower court's opinion indicates some confusion that under these circumstances Article 18.17 is relevant. It did appear that the Court of Appeals felt like it had to award the money to somebody. If it wasn't contraband going to the State, it needed to give it to whoever else was in the proceeding, and there was not even a discussion of Article 18.17. So from the State's perspective, the Court has an opportunity to provide some guidance here to state entities and lower courts, that in this situation --

JUSTICE HARRIET O'NEILL: What about the waiver argument, though? That if it wasn't ever raised, then how do we address it?

ATTORNEY SEAN D. JORDAN: Your Honor, the waiver argument raised by Mr. Huerta misunderstands the reason that the State's brief had discussion of Article 18.17. Article 18.17 is not presented as a theory of recovery for the State. The State did not and could not assert that as a trump to an otherwise valid legal claim that Mr. Huerta has in the property. Indeed, this Court must first determine that Mr. Huerta has no valid legal claim to the property, and therefore that part of the Court of Appeals' judgment must be reversed. But then the Court faces the question of what should happen with the property. And it's true, certainly, that this Court could enter a judgment that said nothing about Article 18.17. The Court could say nothing whatsoever about it and at that point, if it reversed the Court of Appeals' judgment, of their own force, the provisions of Article 18.17 would come into effect and Hidalgo County would be required to dispose of the property under its provisions.

JUSTICE DAVID MEDINA: Okay, help me out here. If it's not contraband, why does he not have a legal claim to that money?

ATTORNEY SEAN D. JORDAN: The reason he does not, Justice Medina, is that he has not articulated and there is no Texas statute or common law principle under which Mr. Huerta would be entitled to possession or ownership of the property. As you noted earlier, he has asserted a number of different common law claims, one of which is finders keepers, he has attempted to make a bailment claim. Those are essentially his two arguments. And if I can go through briefly why neither one of those has merit. His bailment argument has no merit in the first place because he has judicially admitted that he is not acting as a bailee here. He has -- presumably, Mr. Mercado, who was the bailor of the Freightliner, would have been the person who was his bailor. But he has in his own pleadings said Mr. Mercado has abandoned his interest and has asserted his own, meaning Mr. Huerta's ownership interest, so he has judicially admitted he's not acting as a bailee here. Moreover, that's not surprising I guess because there's clearly no express contract for him to be a bailee for the currency. His own testimony at trial said, "I had no idea the money was there. I made no agreement to transport the currency," plus his invoice for towing indicates obviously nothing about the currency, and Texas law would only recognize an implied bailment contract if the currency was in plain sight or if it was reasonably anticipated to be part of what he was transporting, and certainly it was not reasonable for him to anticipate \$281,000 in duct-taped bundles in the axle of the truck.

JUSTICE DAVID MEDINA: What's the state law on -- excuse me -- on treasure hunters that come upon treasures, sunken ships like the La Salle off the coast of Texas and other things like that? Do they share that with the state?

ATTORNEY SEAN D. JORDAN: There is a case that indeed Mr. Huerta cites, the Platoro case that actually has to do with exactly what you're talking about, Justice Medina, it's a sunken Spanish galleon. And in that case, the res or the artifacts and the galleon itself were determined to actually be the property of Texas. But if it was, for example, a marine salvor, a marine salvage company, they might be able to try and get money back from the state for their, the cost of the salvage operation. In that case, it's a federal district court case, the Court did cite to Texas doctrine on lost and mislaid property, and it cited to this Court's seminal case, the Schley case, as its guiding principle. Under the Schley case, it's quite clear that this currency

would be considered mislaid property because mislaid property is property that was obviously intentionally placed somewhere by an owner with the intent that they would come back and retrieve it, but then someone else finds it. Certainly someone acted with intention to duct-tape this material, put it into the axle. It's similar to the Schley case where there was a jar found by a workman hidden in the ground, a jar with a thousand dollars and the Court said, you know, that's got to be mislaid. So under any of those -- well, let me finish. Mislaid property, to the extent it's found, is actually held as bailee by the owner of the premises. In this case, that would be presumably the owner or the person who held the possession of the Freightliner, which is the one item of property Mr. Huerta has undisputedly said he has no interest in whatsoever. So clearly under a mislaid property theory, he's not entitled to it, nor is he entitled to the property under an abandonment theory. As you noted, Justice Medina, abandonment under Texas law requires that someone has relinquished title to the property or ownership without the intent to vest it in anyone else. That remains unowned until someone acquires it with the intent to acquire title. Clearly the record here, and this evidence is established as a matter of law, that Mr. Huerta never tried to establish title at the time that it was found. In fact, if you look in the Reporter's Record, Volume V, Pages 39 and 40, he says he's looking in that area of the truck at the command of the DPS officers. He immediately gives it to them when it's found. In the succeeding days, he never makes any claim to the money. Indeed, he calls Mr. Mercado or Mr. Pulido and tells them that the money has been found, so there's no claim under abandonment. There is another case that Mr. Huerta relies upon that I assume his counsel will talk about and I'd like to address, and they refer to it as "the Bazan case." It's actually State vs. \$2 million cited in their brief. And they say that, well, you know, that case is controlling here because in that case, like here, there was a forfeiture suit and then the forfeiture suit didn't work and they gave the money to the lady they took it from. Her name was Rosa Bazan. The key difference between this case and that case is that in the Bazan case, the state judicially admitted, this is at pages 726 and 727 of that opinion, the state judicially admitted that Ms. Bazan was the owner of the property. That's diametrically opposed to this case, where throughout this litigation Hidalgo County has said Mr. Huerta has no interest in possessing or owning this property. So the Bazan case simply doesn't advance the ball at all for Mr. Huerta. And the other, the waiver argument, as I've stated we would like and we are hoping the Court will include in its opinion some language indicating that Article 18.17 does control in these circumstances. The Court need not do so, but the lower court's opinion does indicate that there may be confusion on this issue.

JUSTICE DALE WAINWRIGHT: Under Article 18.17, (a) says that this unclaimed or abandoned property is delivered to the municipality or the purchasing agent of the county for disposition. And then Subsections (b), (c) and (d) provide for notice in the paper, and if the property is still not claimed within 90 days, then the municipality or county may sell it. So there's still an opportunity for the owner to come forward under Article 18.17.

ATTORNEY SEAN D. JORDAN: Indeed there is, Justice Wainwright, and in fact --

JUSTICE DALE WAINWRIGHT: If he or she dare appear, I suppose.

ATTORNEY SEAN D. JORDAN: That's correct, Justice Wainwright. And indeed, the statute provides that if someone did appear, they, and the

county either denied the claim or failed to act on the claim within 90 days, that person could file a lawsuit in the local district court, this is under Provision 18.17(e), so they could file a lawsuit in a court of competent jurisdiction. I do agree with you that I think that's unlikely in this case that someone would appear, but the statute provides and allows for someone to do so and to make a claim and indeed to appeal a denial of that claim through the court system.

JUSTICE HARRIET O'NEILL: So let me ask you this. If I, let's say I'm walking down the street and I find a wallet, and it's got a lot of money in it but no ID in it. And I can either keep it and don't tell anybody about it, or I can go to the police and say, "I think somebody has lost their wallet." And then a notice goes out, "Does anybody claim it?" And under your interpretation of the law, if nobody claims it, that wallet goes to the police -- I mean it goes to the municipality, it's abandoned?

ATTORNEY SEAN D. JORDAN: Yes, if there was -- I think your hypothetical, Justice O'Neill, was there was no ID in it, so there's no way of knowing whose money that was.

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY SEAN D. JORDAN: And correct, if you turned it in in that way and it's an amount that's less than \$500, or even if it was more than \$500, that would ultimately be the result.

CHIEF JUSTICE WALLACE B. JEFFERSON: But what's the incentive for her to turn it in?

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY SEAN D. JORDAN: Well, let me say this. Under the common law, a wallet that was just found on the ground on the sidewalk, that would be considered lost property -- I'll just finish my answer -- that would be considered lost property, lost through inadvertence, neglect, carelessness. You could in that circumstance actually hold that wallet, and your claim to holding it would be good as against anyone but the true owner. The true owner could come and make a claim of that wallet. We know that from the Neale vs. Kirkland case, which is cited in our brief at page 19. But if you turned it in, yes, it would -- Hidalgo County would be required to file those procedures once you turned it in.

JUSTICE DAVID MEDINA: Chief, may I ask one more question, please?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, Justice.

JUSTICE DAVID MEDINA: I think I know what the answer is, but say you left counsel's table and you left your wallet here. That's an abandoned property, right? But you never came back to get it. It has no ID, we assume it's yours. So that would be abandoned?

ATTORNEY SEAN D. JORDAN: Well, I'd like to think under that circumstance, Justice Medina, it wouldn't be considered abandoned because I wouldn't have had the intent to relinquish ownership.

JUSTICE DAVID MEDINA: Misplaced?

ATTORNEY SEAN D. JORDAN: Huh?

JUSTICE DAVID MEDINA: Misplaced? What's the difference? I mean how do we analyze that differently?

CHIEF JUSTICE WALLACE B. JEFFERSON: Let's test the theory. Let's see what happens.

JUSTICE HARRIET O'NEILL: You'll never know, [inaudible] .

ATTORNEY SEAN D. JORDAN: Fortunately I didn't bring my wallet.

ATTORNEY SEAN D. JORDAN: Fortunately I did not bring my wallet with me. But I do think that the cases that talk about abandoned property, and this goes to what you noted earlier, that this may be a circumstance where somebody was intentionally abandoning the property.

Indeed, you know, Mr. Mercado, the evidence showed Mr. Mercado was well aware that the vehicle was being stopped, and he was circling and he knew it happened and he drove off and never attempted to make any claim to it. I think you would want to look for some sort of conduct or demonstrable omission on the part of the owner before you could say this is really abandoned.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you.

ATTORNEY SEAN D. JORDAN: If there are no further questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Yes.

JUSTICE HARRIET O'NEILL: Well, what's the difference between lost and mislaid?

ATTORNEY SEAN D. JORDAN: The difference between lost and mislaid is this, Justice O'Neill, mislaid property is property that the owner intentionally placed somewhere. For example, in the Schley case, the jar that was buried in the ground. That wasn't inadvertent, that wasn't accidental, somebody dug a hole, they put the money in the jar and they buried it. Lost property is property that's lost through neglect or inadvertence. For example, you know, I leave my watch at a restaurant or I leave my watch somewhere accidentally. That's the difference between lost and --

JUSTICE HARRIET O'NEILL: Well, let me make sure I understand your position. If it is your watch that you left at a restaurant and I find it and it's lost and nobody claims it, who gets it?

ATTORNEY SEAN D. JORDAN: If it's lost and someone secures possession with the, again, with the intent to acquire title, to acquire ownership, someone would need to be holding that with the intent to acquire ownership, that person would hold it as against the true owner. In other words, that person could hold that property unless and until the true owner came forward, and they could not hold the property. So if it's my watch and you're holding it, and I find out and I file a suit, you're not going to be able to keep that watch as against me if I can show I'm the true owner.

JUSTICE HARRIET O'NEILL: But if I turn it in to the restaurant and say, "If they don't come back after a certain period of time, let me know because then it's mine." Do I have a valid claim?

ATTORNEY SEAN D. JORDAN: If you turn it over to the restaurant?

JUSTICE HARRIET O'NEILL: Where it's left and say, "If anybody calls here it is, but if nobody calls it's mine."

ATTORNEY SEAN D. JORDAN: That's an interesting question, Justice O'Neill --

JUSTICE HARRIET O'NEILL: Well, that's kind of what happened here.

ATTORNEY SEAN D. JORDAN: -- because the question might be whether or not, if you turned it over immediately to the restaurant, it might be whether or not you were attempting to hold the property or not for yourself, or if you were turning it over to someone else.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Mallett will present argument for the Respondent.

ORAL ARGUMENT OF EDWARD A. MALLETT ON BEHALF OF THE RESPONDENT

ATTORNEY EDWARD A. MALLETT: May it please the Court, Gregorio Huerta, as Respondent here, asks the Court to affirm the decision of the Court of Appeals. The Court of Appeals correctly cited Respondent's pleadings wherein he stated his claim that his interest in the currency

is superior to the State's. I'll begin by discussing his interest in the currency and then turn to Code of Criminal Procedure Article 18.17 cited by Petitioner. In discussion with the Court on intervention, reported in Volume VII, page 6, we agreed that a party to a lawsuit is anyone with an interest. The owner of property is defined by a statute, Code of Criminal Procedure 59.01(6), "An owner is anyone with an equitable or legal ownership interest," equitable or legal ownership interest. The statute provides at 59.03(d) that the last party in possession can make a claim for the property at the time of seizure. I'll digress to say Mr. Huerta is barely literate and not learned in the law, but his legal right to claim recovery attached at time of seizure.

JUSTICE HARRIET O'NEILL: Okay, when was the cash seized?

ATTORNEY EDWARD A. MALLETT: It was seized when the truck went under the control of DPS Trooper Torres.

JUSTICE HARRIET O'NEILL: But isn't that a point we have to decide? Because the argument is made that that was just the truck being seized, and the cash wasn't seized until the truck was under the possession of the Department.

ATTORNEY EDWARD A. MALLETT: With respect, in our law we contemplate two times of possession, actual and constructive. When law enforcement took constructive control and possession of the vehicle, they had possession and seizure of the contents whether they knew the contents or not. Then actual physical holding of the cash occurred after Huerta cut the packages open with his pocketknife, whereupon the officers on the bridge at Hidalgo took it.

JUSTICE DAVID MEDINA: Well, what if that would have been dope?

ATTORNEY EDWARD A. MALLETT: Sir?

JUSTICE DAVID MEDINA: What if that package would have been dope, would that dope have been his? I'm sure he wouldn't be making a claim for that, right?

ATTORNEY EDWARD A. MALLETT: You asked two questions. The answer to the second question would be no --

JUSTICE DAVID MEDINA: Obviously.

ATTORNEY EDWARD A. MALLETT: -- because that's per se contraband. But the answer to the first question might well be yes, because under criminal law for criminal responsibility, there must be both possession and knowledge or intent. So that if he did not know or intend that it was contraband until it was in the presence of and he was under the instructive of and acting under the orders of law enforcement, then his possession would not be culpable.

JUSTICE DAVID MEDINA: Well, how is that any different here? He had, he's not a learned man, but he's obviously wise enough to hire a counsel. He opens this and it turns out to be money, so how is that any different, his knowledge and culpability?

ATTORNEY EDWARD A. MALLETT: What is different here is that the money is not contraband. It's not per se contraband, by the decision of the jury, it is not in fact contraband, and by the abandonment of the State of their contention, it is as the law of the case not contraband. And so that would be the distinction between currency and narcotics, respectfully.

JUSTICE DAVID MEDINA: Okay. I'm just curious, what could it be if it's not contraband, even though we're not to decide that issue, what could that money be? Just a gift from a leprechaun?

ATTORNEY EDWARD A. MALLETT: Well, it is a digression, but I will talk about it. We complained that the Court instructed the jury only in the most general and vague terms -- because we won this argument, I

left the definition over here -- and it said, "Contraband means the proceeds gained from the commission of a felony under Chapter 481 Health and Safety Code, Texas Controlled Substances Act, a felony under Chapter 483 Health and Safety Code." We objected to that, as giving the laypeople on the jury no guidance. Who knows what's in Chapters 481 and 483 of these statutes? There was no amplification of the instruction and no testimony about it. The Solicitor conceded in his brief that it might have been some other violation of the law not in those specific chapters or perhaps no violation of the law at all.

JUSTICE DAVID MEDINA: What's his equitable claim to the money?

ATTORNEY EDWARD A. MALLETT: His equitable claim to the money gives -- that's an excellent question because it gives me the right to continue. When we started our dialogue I had pointed out that the last party in possession has a right to claim it at time of seizure. The statute further provides under 59.04(d) that the last party in possession at time of seizure shall be a party to a lawsuit. Now that is mandatory language, "shall be a party." I had the opportunity, and this commingles with our 50 and 17 discussion that we'll have in just a few minutes, to go back and read the statute carefully to determine how these statutes could be different and how the Legislature could have written them both. Under 59.04(l), requiring that the last party in possession at time of seizure shall be a party is 59.04(k), the successive statute, attached as an exhibit, as an attachment in the materials and in the statutes. "If no person was in possession of the property at the time it was seized and if the owner of the property is unknown," no person in possession and the owner unknown, "the attorney representing the state shall file with the Clerk of the Court in which the proceedings are pending an affidavit," et cetera, leading to citation by publication. So that in a proceeding for forfeiture under Chapter 59, notice goes to a person who says "I am an owner," and the last party in possession. The property rights of the public are protected to the extent that the last party in possession has a right to be made a party to the lawsuit. Gregorio Huerta testified --

JUSTICE NATHAN L. HECHT: Is it your position then that the right to be made a party to the lawsuit gives him an interest in the property?

ATTORNEY EDWARD A. MALLETT: Yes, particularly in the factual context of this case, where he acquired control of the truck lawfully by contract, and where under his undisputed testimony when a person who employs him to convey cargo does not subsequent claim recovery from him, he acquires ownership. He used the specific example in his testimony that in the year preceding the seizure, he had acquired title to some 13 trucks and their contents. It is a part of his business to acquire ownership of property and cargo lawfully in his possession for hire.

JUSTICE NATHAN L. HECHT: Well, I'm just trying to understand. Apart from those facts, you said, "Yes, with these particular circumstances in the case." But I'm just trying to understand, does (j) by itself, 59.04(j) by itself give the person who is made a party an interest in the property?

ATTORNEY EDWARD A. MALLETT: Yes, sir. It gives him an interest --

JUSTICE NATHAN L. HECHT: Even if he was just wandering by at the time and happened to find it?

ATTORNEY EDWARD A. MALLETT: No, first it has to not be contraband. Second, he has to be found in fact to be in possession; that is, as defined in the Court's charge in compliance with the Code of Criminal Procedure.

JUSTICE NATHAN L. HECHT: So even if under the law, apart from the statute, he would not have an interest in the property, the statute gives him an interest?

ATTORNEY EDWARD A. MALLETT: The statute gives him an interest because he's the last party in the possession, it is not contraband, he shall be made a party, and indeed notice need not be given to all the world if he is known to be the party in possession, and finally, he has an equitable interest established under his testimony to acquire title to that which his customer or any other person makes no subsequent claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Mallett, what does it mean for a seizure to take place? Is there some official act that's done, papers signed, or it is just when, as in this case, the authorities retain possession?

ATTORNEY EDWARD A. MALLETT: I believe the law would sustain this proposition, that a seizure occurs when the State of Texas acting through law enforcement authorities takes effective control of the property and the individual is no longer able to do with it as he wishes, destroy it, remove it, travel away with it. It certainly happened here when those packages turned out to be currency, no question about that.

CHIEF JUSTICE WALLACE B. JEFFERSON: But he never at that point or any time later said, "No, this is mine. I own this property," or that I'm the owner, and you shouldn't --

ATTORNEY EDWARD A. MALLETT: Well, I said that in the intervention.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yeah.

ATTORNEY EDWARD A. MALLETT: What he said was that Agent Torres told him when he went around the next day, "Oh, we're going to give you something, we're going to give you a reward." And then rolling back, at Volume V, "Why did you leave it there at the DPS?" "Answer: They instructed me to leave it there." And then turning over to page 17, same volume, "They told me no one claimed it, they told me they would give me a reward." And then there's a little talk about how they gave him a run-around from agency to agency.

JUSTICE DAVID MEDINA: Well, that happens sometimes in the government, but why would he be entitled to the entire amount?

MARSHALL: Because as the Court of Appeals correctly found, he has an interest in the property superior to any interests of the State of Texas.

CHIEF JUSTICE WALLACE B. JEFFERSON: Maybe the State has an interest in fighting crime. I mean it's hard to imagine, and I understand the JNOV point is gone, but it's hard to imagine how this money came to be where it was without some form of criminal activity taking place, and as between the State and its citizens and a person who happens upon this mislaid or lost property, it seems to me equitably to be better then to remain in the hands of the state.

ATTORNEY EDWARD A. MALLETT: What I know is we are here under the laws of the State and not sitting in terms of trying to decide what's fair and square, and as Amicus, expressing the views of the State of Texas, conceded, it may have been from some offense outside the narrow definition in which the jury was instructed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Maybe under the laws of the state, it makes more sense to channel this through an 18.17 proceeding rather than let it remain in the hands of just somebody who happens upon what appears to be either a drug-related or other crime-related mislaying or secreting of money.

ATTORNEY EDWARD A. MALLETT: Well, then perhaps I should move

forward from the express statutory language, that he shall be made a party and that the only notice need to go to a known owner and the last party in possession, and turn to Article 15.17.

JUSTICE DALE WAINWRIGHT: 18.17?

ATTORNEY EDWARD A. MALLETT: 18.17, please excuse me.

JUSTICE DALE WAINWRIGHT: Would your client have the right to assert an ownership interest after a publication in an 18.17 proceeding?

ATTORNEY EDWARD A. MALLETT: Yes, sir. Your Honor, I was going to wind up there, but we'll just start there. Under the 18.17 proceeding, which the Solicitor General suggests we might want to consider doing now beginning seven years later, there are two relevant concepts. One is that in that proceeding, there shall be notice published to all the world if the owner is not known. Now, we claim he's the equitable owner and he would come in and say, "I'm the owner, give me the money." And then the statute says, "Well, if they don't happen to agree with you," -- "they" by the way are no longer the District Attorney and the Department of Public Safety who want to divide this money 50-50 -- "they" now under 18.17 become the purchasing agent for Hidalgo County or the Sheriff of Hidalgo County if Hidalgo County has no purchasing agent. And they then publish notice if the owner is not known, and someone can step up -- Gregory Huerta can step up now, next year, the year after and say it's mine. And if they decline to give it to him, it becomes his burden to initiate an entirely new lawsuit. And upon that lawsuit, what other person might be in Court based on the citation by publication to controvert his claim? Well, we really don't know. But we do know this. Under this statute, Subsection G, there is a provision that if after proceedings occur, either a contest by the claimant or the absence of a contest so that under the statute the materials are now in the possession of the Sheriff, or now in the possession of a purchasing agent if Hidalgo County has one, they may order that the property after disposition, the seizing agency can request transfer of the property for use by the seizing agency. Here, well, that might be the Department of Public Safety and its partner in the division of proceeds, the District Attorney for Hidalgo County. So we can come around full circle and wind up the same place. What is different? What is different are the notification requirements. Only the last party in the possession and the owner if known need be given notice under Chapter 39 forfeiture. The owner, and if the owner is not known, must be given notice by publication under the other provision of the Code of Criminal Procedure, and in that case the claimant must file a lawsuit rather than the lawsuit initiated for forfeiture by the State. But the twin issues of whether there is an equitable ownership that ripens into an ownership interest and entitles him to recovery of the property remains, and the concept that the money would be somehow returned, or would be returned ultimately for use by the District Attorney's office who chose to plead narrowly remains the same. If they had pled broadly, then they might have pled that the money was from some non-narcotics offense, money laundering, bulk-cash smuggling, tax evasion, people cobbling their money together and trying to --

JUSTICE DON R. WILLETT: Let me ask you this --

ATTORNEY EDWARD A. MALLETT: Yes, sir.

JUSTICE DON R. WILLETT: Your client was not paid in advance for moving the truck from Point A to Point B; is that correct?

ATTORNEY EDWARD A. MALLETT: Your Honor, I may have misled you. He was paid, but he was given a down payment --

JUSTICE DON R. WILLETT: Before the move?

ATTORNEY EDWARD A. MALLETT: -- and then subsequently the balance of the money that was paid.

JUSTICE DON R. WILLET: So partially paid but not fully paid?

ATTORNEY EDWARD A. MALLETT: Yes, and he called Trooper Torres first and said, "I'm worried, this fellow hasn't come to pay me the rest of my money. Maybe there's a problem, maybe this truck is stolen."

JUSTICE DON R. WILLET: If you client had been fully paid on the front end, would it make a difference?

ATTORNEY EDWARD A. MALLETT: In my judgment it would not make a difference.

JUSTICE DON R. WILLET: You would still have an equitable or legal ownership stake?

ATTORNEY EDWARD A. MALLETT: He was the last party in possession before seizure by the State. He would have an interest superior to the interest of the State of Texas under these pleadings. The could have pled in the alternative, "If this currency is not contraband, then we request that the Court allow us to deliver it to the purchasing agent of the county or the sheriff of the county for disposition under Article 15.17 for the reason that there is no criminal case or investigation now pending." But those were not in their pleadings, those were not in their jury instructions, that was not in their brief in the Court of Appeals, that was not in the motion for rehearing in the Court of Appeals. That --

JUSTICE DAVID MEDINA: Excuse me, Mr. Mallett. If we close our eyes to what appears to be contraband, which is going to be hard to do, but then we look at this \$70,000 and you have an equitable claim which seems to make sense, and these claims perhaps don't happen often, I mean what do you want us to do? Obviously let your client keep this money and then perhaps the Department of Public Safety or Homeland Security shouldn't let private individual citizens be involved in the search of a vehicle, and maybe that will correct the problem? But this a tough, tough issue to resolve.

ATTORNEY EDWARD A. MALLETT: Well, I think we should encourage citizen-police cooperation. People should not be afraid of their police agencies and should feel that if they are in suspicious circumstances that might be of interest to law enforcement, that they should be encouraged to bring law enforcement in, and they should be confident that law enforcement will respect the laws that protect the rights of all the citizens, including the last party in possession before seizure. The law abhors a forfeiture. They brought this under a forfeiture statute, they choose their statutes and their grounds for relief, here for a division of the money between two specific agencies and not for all the citizens of the State of Texas. It was their election waived throughout the case and through this day, until Amicus filed, come entering the case from left stage, saying, "Well, wait a minute, there's another privilege under the law" --

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court, the Court invited the State to brief. --

ATTORNEY EDWARD A. MALLETT: Absolutely, and the Court may wish to write an opinion saying, "Well, on timely application and pleading in its third amended petition, there might have been grounds for relief that were then available involving other subagencies or subdivisions of the State of Texas or the county."

JUSTICE DON R. WILLET: Just out of curiosity, where did the jury get \$70,000?

ATTORNEY EDWARD A. MALLETT: If I can be informal?

JUSTICE DON R. WILLET: Sure.

ATTORNEY EDWARD A. MALLETT: Some say that some juries decide cases with their hearts as much as their heads, Mr. Huerta was given the run-around on this, he found the money, he gave this away, if he was not a good citizen reporting it to Officer Torres and getting the police involved, none of this would have happened.

JUSTICE DON R. WILLET: So it would have been equitable --

ATTORNEY EDWARD A. MALLETT: The state, the state looks for windfall just as much as Mr. Torres, and humbly, looks for a windfall.

JUSTICE DON R. WILLET: So it's just an equitable --

ATTORNEY EDWARD A. MALLETT: Nobody earned this money that's in this lawsuit. The Court --

JUSTICE DALE WAINWRIGHT: The \$70,000 is less than the 30 percent he said he was -- that the officer agreed to give him.

ATTORNEY EDWARD A. MALLETT: I cannot answer what happened in that jury room. It would not be relevant here, the parties all agree that the answer to Question No. 3 is immaterial under the facts and law that apply to the case. One brief comment as my time is out, I have 40 seconds.

ATTORNEY EDWARD A. MALLETT: About the Freightliner. About the Freightliner. The State of Texas elected to sever the Freightliner in the case, the State elected to pursue the Freightliner in one district court under one cause number, and the currency in another district court under another cause number. As the memorandum opinion correctly states on page 9, Footnote 12, Mr. Huerta made a decision that he would not seek recovery of the Freightliner because the condition it was in was such that it was simply not worth it.

CHIEF JUSTICE WALLACE B. JEFFERSON: I think they are --

ATTORNEY EDWARD A. MALLETT: The issue of the Freightliner is not material to the disposition of this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: I think there are two questions. Justice Willet, did you have one? Justice O'Neill?

JUSTICE HARRIET O'NEILL: When you say the State could have chosen to bring some other type of claim, well, what claim are you talking about they could have brought other than forfeiture for contraband?

ATTORNEY EDWARD A. MALLETT: Oh, they could have said, "We're holding this currency for investigation in a criminal case, and we have determined there is not a criminal case," because there's not, "and so we ask that if there is a finding it is not forfeiture, we be allowed to keep it to turn over to the sheriff or the purchasing agent for disposition pursuant to the Code of Criminal Procedure."

JUSTICE HARRIET O'NEILL: And that would be under 18.17, abandoned property or evidence?

ATTORNEY EDWARD A. MALLETT: That would be correct. They could have made that in their pleadings seven years ago.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF TIMOTHY A. DAVIS ON BEHALF OF PETITIONER

ATTORNEY TIMOTHY A. DAVIS: I'm not aware that we could litigate the issue of 18.17 initially in a lawsuit that our main pleading would be Chapter 59. My experience with 18.17 is it's actually done nonjudicially and it's only if somebody comes forward and makes a claim to the property and the commissioners court of the county denies their claim, that actually that person making that claim has to initiate the litigation. So as far as my rebuttal to that assertion, I don't believe

that would be possible for us to plead alternatively, forfeiture under Chapter 59, but if we don't get that, we want abandonment under Chapter 18.17.

JUSTICE HARRIET O'NEILL: Does 59.04 give the party in possession some sort of ownership interest, equitable ownership interest?

ATTORNEY TIMOTHY A. DAVIS: We differ on that. I don't believe it does. It does say that the person in possession at the time of the seizure should be made a party --

JUSTICE DAVID MEDINA: Is it "should" or "shall"?

ATTORNEY TIMOTHY A. DAVIS: Shall, "shall be made a party." I think the way it's written, to be honest with you, the Legislature looks at vehicle forfeitures, and this happens a lot, somebody's driving a vehicle, it has marihuana, cocaine, it's stopped, the officers seize the vehicle. Quite often the person that was operating the vehicle is not the registered owner, not even an equitable owner, but is a mule employed by some, you know, drug-smuggling organization, but that they're supposed to be given notice. In this case, obviously, the DPS trooper is the one who prepared what's called the seizure affidavit. He makes the determination in the field as to who may be the owner, who was in possession, things like that. Obviously he didn't feel that Mr. Huerta was ever actually in possession of the currency. Certainly Mr. Huerta was there in the field, he had contact with the currency, he initiated the police action which led to the seizure of the currency, but the testimony at trial for Mr. Huerta and from Trooper Torres was Mr. Huerta never asserted any ownership interest at the scene of the seizure, he never asserted ownership interest --

JUSTICE HARRIET O'NEILL: Why does that matter though? You're not claiming he waived raising that issue? I mean he did intervene.

ATTORNEY TIMOTHY A. DAVIS: No, because -- well, because Mr. Mallett is saying that Mr. Huerta should have been made a party to the forfeiture action from the beginning, which he wasn't. He actually intervened in the case, so that's why Mr. Huerta has said it made some type of difference.

JUSTICE HARRIET O'NEILL: But that was his basis for intervention, was being the party in possession.

ATTORNEY TIMOTHY A. DAVIS: Exactly. Not, and he actually, I don't think in his pleadings he never asserted any ownership interest -- or he did not assert any ownership interest in the currency, but I guess it's --

JUSTICE HARRIET O'NEILL: But as the party in possession, why, and if this is not contraband which has been conceded, as the party in possession, why isn't the party in possession, why don't they have a superior right to the State if contraband is not proven? Why shouldn't they?

ATTORNEY TIMOTHY A. DAVIS: Because they would have to show some ownership interest or equitable interest in some or all of the property.

JUSTICE HARRIET O'NEILL: Well, but again, why -- as between two people with property who you might give the property to, why wouldn't the person who possesses it have a superior interest equitably if there's no basis for a seizure, no basis for a forfeiture?

ATTORNEY TIMOTHY A. DAVIS: Meaning that there was a finding that was not contraband, so the next step is who do we give it to? So sort of you're putting it how the Thirteenth Court of Appeals looked at it. I think because in this particular case, because Mr. Huerta never established any interest, equitable or otherwise --

JUSTICE HARRIET O'NEILL: Neither did the State. And so my

question, nobody having any ownership in it, we've got to decide who does it go to, and give me a reason why it should go to the State as opposed to the person who has possession?

ATTORNEY TIMOTHY A. DAVIS: Well, I think, while we're here not saying that it should go to the State, we're here saying that what the Court should do is say, "18.17 applies here." The property is not contraband, the owners who the law enforcement felt were the owners --

JUSTICE HARRIET O'NEILL: Okay, so let's say that happens and then an abandonment proceeding begins and Huerta comes in and files an equitable claim because I had possession.

ATTORNEY TIMOTHY A. DAVIS: Then he would have to go before the Commissioners Court, as I understand it, make the claim, they would have to make a decision as to whether Mr. Huerta was entitled to the money or some of the money. If they did not make a decision that was favorable to him, he would have the opportunity to bring a lawsuit against the county to recover the money and prove his case.

JUSTICE PHIL JOHNSON: Well, it seems that it could be a little troubling that we have a man driving down a lonely stretch of road in possession of the tractor and the truck and everything there. I mean nobody else was in possession of it. And he gets stopped and there's no determination that anything was done illegally, there was a seizure and no determination that anything was done illegally, and the State now takes that property as opposed to giving it back to the person who, as far as anyone knows, had permission of whoever owned it before or whoever had it before, but the State just jumps in and says, "Well, we're going to take this property and start proceedings." It just seems somehow that bothers your sense of what's proper as to property rights of citizens as opposed to the State. So he actually was in possession of this, was he not? You say he was not in possession of the money, but wasn't he at all times until the State took it away from him, wasn't he in possession of it?

ATTORNEY TIMOTHY A. DAVIS: I think -- I mean he was definitely in possession of the truck/tractor that contained the money --

JUSTICE PHIL JOHNSON: Well, wait. Who was in possession of the money when he's driving down the road out there? Was it DPS?

ATTORNEY TIMOTHY A. DAVIS: No, sir.

JUSTICE PHIL JOHNSON: Well, who was?

ATTORNEY TIMOTHY A. DAVIS: I think Mr. Huerta was by virtue of his being in possession of the truck/tractor was also in possession of the money, even though his testimony was he didn't know the money was in the --

JUSTICE PHIL JOHNSON: If he had a load of cantaloupe, who would have been in possession of the load of cantaloupes as he drove down the road?

ATTORNEY TIMOTHY A. DAVIS: Mr. Huerta would have been.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY TIMOTHY A. DAVIS: But then again, but the law, if he knows the load of cantaloupes are there, obviously he has knowledge and his bailor-bailee relationship, if it's something that's open and obvious --

JUSTICE PHIL JOHNSON: I'm not talking bailor-bailee, we're talking in possession.

JUSTICE DAVID MEDINA: Why does it matter -- I'm sorry. Why does it matter if he has knowledge or no knowledge though? If he's going to transport these goods across America, what difference does it make if he has knowledge?

ATTORNEY TIMOTHY A. DAVIS: Well, for him to make an ownership or

an equitable claim to the property, by his own --

JUSTICE DAVID MEDINA: Well, does the statute require him to have knowledge on an equity claim?

ATTORNEY TIMOTHY A. DAVIS: I think so, I think he would. I mean or to make even a claim under abandonment, he would have had to have knowledge. He testified he didn't have knowledge, he knew about the money at the same time the DPS troopers and Custom agents knew about it, once they're pulling it out of the axle.

JUSTICE DAVID MEDINA: Well, he knew where to go look for it.

ATTORNEY TIMOTHY A. DAVIS: He did, and, yeah, that's not contested. I mean he's the one that had --

JUSTICE DAVID MEDINA: Yeah.

ATTORNEY TIMOTHY A. DAVIS: -- the tools and knew where it probably was.

JUSTICE DAVID MEDINA: But you also agree it's not contraband then?

ATTORNEY TIMOTHY A. DAVIS: Excuse me?

JUSTICE DAVID MEDINA: And it's not contraband, correct?

ATTORNEY TIMOTHY A. DAVIS: That's the position we're taking here, Judge.

JUSTICE DAVID MEDINA: Okay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. That concludes the arguments for this morning, and the Marshall will adjourn the Court.

[End of audio recording.]

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