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DUE PROCESS IN CIVIL FORFEITURE CASES IN WASHINGTON AFTER *TELLEVIK v. REAL PROPERTY*

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Abstract: In *Tellevik v. Real Property,* the Washington Supreme Court held that the government's seizure of real property through an ex parte proceeding complied with the due process requirements of the federal Constitution. This Note examines the *Tellevik* decision in light of United States Supreme Court case law on procedural due process and lower federal court rulings in real property forfeiture cases. It argues that the *Tellevik* court, in reaching its decision, misapplied federal case law and concludes that due process requires an opportunity for a full hearing before the government can deprive an owner of real property.

Is a property owner always entitled to a hearing before the government can seize his or her real property? The Washington Supreme Court answered in the negative. In *Tellevik v. Real Property,*[1] a Washington state drug task force found a marijuana growing operation on real property and applied ex parte for a warrant to seize the property.[2] The Washington Supreme Court held that seizure of real property through an ex parte probable cause proceeding satisfies the requirements of due process.[3]

This Note argues that the *Tellevik* court reached its decision through flawed analysis and application of federal due process standards, and concludes that due process requires an opportunity for a full evidentiary hearing before real property can be seized. Part I provides a general survey of federal case law regarding due process in forfeiture seizure proceedings involving real property and a description of the *Tellevik* decision. Part II critiques the Washington Supreme Court's decision in *Tellevik* on two grounds. First, the court improperly interpreted the relevant United States Supreme Court cases involving procedural due process before deprivation of an owner's property interest. Second, the court wrongly applied the balancing test set out in the Supreme Court case law to the present case. This Note suggests that the *Tellevik* court should have distinguished between real property and personal property, and concludes that courts should read into the Washington forfeiture statute a requirement of a predeprivation hearing.

1. 120 Wash. 2d 68, 838 P.2d 111 (1992).
2. *Id.* at 73, 838 P.2d at 113.
3. *Id.* at 87, 838 P.2d at 121.

I. FEDERAL LAW ON PROCEDURAL DUE PROCESS IN FORFEITURE SEIZURE CASES AND *TELLEVIK v. REAL PROPERTY*

A. Due Process Analysis of Forfeiture Seizure Statutes by Federal Courts

The United States Supreme Court has never addressed procedural due process in the context of real property forfeiture. However, the Court has extended due process protection to prejudgment seizure of personal property in civil cases. In addition, the majority of lower federal courts that have considered the issue have required a pre-seizure evidentiary hearing in civil forfeiture cases involving real property.

1. United States Supreme Court Rulings on Procedural Due Process

Even though the Supreme Court has never addressed the issue of procedural due process in the context of real property forfeiture,[4] the Court's decisions involving prejudgment seizure of personal property provide an analytical framework for deciding real estate forfeiture cases and courts continue to look to these cases for guidance. In four decisions handed down between 1969 and 1975,[5] the Court expanded the range of property interests protected by federal due process to include temporary deprivations of personal property resulting from prejudgment proceedings.[6] Recently, the Court reaffirmed its position that due process requires a hearing before the government can deprive an owner of personal property.

In *Fuentes v. Shevin*,[7] the Court held unconstitutional Florida and Pennsylvania prejudgment replevin statutes[8] that did not provide for

4. *Id.* at 79, 838 P.2d at 117.

5. North Ga. Finishing v. Di-Chem, 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

6. For an insightful review of the ramifications of these cases, see Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

7. 407 U.S. 67 (1972). One of the property owners in this case was the purchaser of several consumer goods on an installment payment plan. After the buyer failed to make timely payments, the seller applied, ex parte, to the court for a writ of replevin pursuant to a Florida statute. *Id.* at 70–72.

notice and an opportunity to be heard prior to attachment of property.[9] The Court reiterated its long-standing position that due process requires that "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[10] The Court further required that the hearing must be granted at a time when the deprivation can still be prevented.[11] The Court also mentioned "extraordinary situations" that may justify postponing the hearing.[12] These situations, however, must be truly unusual.[13] Absent such exigent circumstances, due process requires that the property owner have a prior hearing.[14]

In *Mathews v. Eldridge,*[15] the plaintiff, whose social security disability benefits had been terminated, challenged the constitutional validity of the administrative procedures for assessing the existence of a continuing disability.[16] The Court laid out a three-pronged balancing test to determine whether the requirement of due process has been satisfied, and considered the following interests.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[17]

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8. *See id.* at 96. The replevin statutes required only that the applicant file a complaint, initiate a court action for repossession, recite in a conclusory fashion that he or she is "lawfully entitled to the possession" of the property, and file a security bond. *Id.* at 74.

9. *Id.* at 70.

10. *Id.* at 80 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

11. *Id.* at 81.

12. *Id.* at 90.

13. *Id.* The Court identified three elements of an "extraordinary situation": first, the seizure is intended to secure an important governmental or general public interest; second, there is a special need for very prompt action; third, the state keeps strict control over its monopoly of legitimate force. *Id.* at 91. Examples of "extraordinary situations" include tax collection, national war effort, bank failure, misbranded drugs, and contaminated food. *Id.* at 92.

14. *Id.* at 96–97 (quoting Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring)).

15. 424 U.S. 319 (1976).

16. *Id.* at 324–25. Based upon a questionnaire completed by the plaintiff, the state agency determined that he had ceased to be disabled. The Social Security Administration then terminated his benefits. *Id.* at 324.

17. *Id.* at 335.

Applying the test, the *Mathews* Court first determined that the sole private interest involved was in the uninterrupted receipt of the disability income pending a final administrative decision on the recipient's claim.[18] Second, while conceding that the hardship imposed upon a disability recipient whose benefits are erroneously terminated may be significant, the Court nonetheless found that the potential value of an evidentiary hearing was substantially less in this case than in welfare cases.[19] Finally, the *Mathews* Court found that the government's interest in conserving scarce fiscal and administrative resources was significant given the unique nature of the administrative process.[20] On balance, the Court concluded that an evidentiary hearing was not required prior to the termination of disability benefits.[21]

Most recently, in *Connecticut v. Doehr,*[22] the Supreme Court applied the *Mathews* balancing test to determine the validity of a Connecticut attachment statute. In *Doehr,* a tort claim plaintiff[23] applied, ex parte, to a Connecticut superior court for a prejudgment attachment of Doehr's home, pursuant to the Connecticut prejudgment attachment statute.[24] First, the Court found that the private property interests were significant because attachment clouds title, impairs the ability to alienate the property, taints any credit rating, and reduces the chance of obtaining a home equity loan or additional mortgage.[25] Second, the Court determined that the risk of erroneous deprivation was substantial.[26] The

18. *Id.* at 340. Without elaborating on the issue, the Court implied that the private interest was not significant because eligibility for disability benefits is not based upon financial need. *Id.*

19. *Id.* at 342–45. The Court based its conclusion upon the finding that the agency's decision whether to discontinue disability benefits would turn, in most cases, upon routine, standard, and unbiased medical reports by physicians. *Id.* at 344. The Court's decision was further influenced by the built-in safeguards in the administrative procedure. First, the questionnaire which the agency periodically sent the recipient identified with particularity the information relevant to the entitlement decision; second, the recipient was invited to the local agency office for assistance; finally, the recipient's representative had full access to all information relied upon by the agency. *Id.* at 343–44.

20. *Id.* at 347–48.

21. *Id.* at 349.

22. 111 S. Ct. 2105 (1991).

23. The plaintiff sued Doehr in a civil action for assault and battery. *Doehr,* 111 S. Ct. at 2109.

24. *See* CONN. GEN. STAT. § 52-278e(c) (1991). The statute authorized prejudgment attachment of real estate without prior notice or hearing, without a showing of extraordinary circumstances, and without a requirement that the person seeking the attachment post a bond. *Doehr,* 111 S. Ct. at 2109.

25. *Id.* at 2112–13. The Court refuted the state's argument that only complete and permanent deprivation merits due process protection. To the contrary, the Court concluded that temporary or partial impairments to property rights "are subject to the strictures of due process." *Id.* at 2113 (quoting Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 85 (1988)).

26. *Id.* at 2114.

Court reasoned that since the tort claim was not prone to documentary proof and the plaintiff's affidavit was based on conclusory statements, the judge at the ex parte proceeding could make no realistic assessment concerning the likelihood of an action's success.[27] Third, the *Doehr* Court concluded that the government's interest was minimal because the suit involved a dispute between two private individuals.[28] Weighing these factors, the Court held that the Connecticut statute authorizing attachment of real property without prior hearing and without a showing of extraordinary circumstances violated due process.[29]

Calero-Toledo v. Pearson Yacht Leasing Co.[30] is the only Supreme Court case on due process issues under drug forfeiture statutes. In *Calero-Toledo,* the government seized a yacht that was subject to forfeiture under a Puerto Rico statute.[31] The Supreme Court permitted outright seizure of the yacht with no prior notice or hearing based on exigent circumstances.[32] The Court reasoned that notice or a hearing might frustrate the government interests because the property could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.[33] The Court concluded that the seizure constituted an "exigent circumstances" exception under *Fuentes.*[34]

2. *Rulings by Lower Federal Courts on Pre-Seizure Notice and Hearing When Real Property Is Seized*

The majority of federal courts that have considered the issue of procedural due process in the context of real property forfeiture proceedings have required an evidentiary hearing prior to the seizure.[35]

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27. *Id.* The Court further noted that the statute does not provide adequate safeguards to reduce the risk of erroneous deprivation. *Id.* at 2114–15.

28. *Id.* at 2115.

29. *Id.* at 2109. For a good summary of the implications of *Doehr,* see Janice Gregg Levy, Comment, *Lis Pendens and Procedural Due Process: A Closer Look After* Connecticut v. Doehr, 51 MD. L. REV. 1054 (1992).

30. 416 U.S. 663 (1974).

31. *Id.* at 665–68.

32. *Id.* at 679–80.

33. *Id.* at 679.

34. *Id.* at 679–80; *see also* United States v. Von Neumann, 474 U.S. 242, 251 (1986) (holding that no pre-seizure hearing is required when customs officials make seizures at border).

35. The federal forfeiture statute is very similar to its Washington counterpart. *Compare* 21 U.S.C.A. § 881(a) (West 1981 & Supp. 1993) *with* WASH. REV. CODE ANN. § 69.50.505 (West Supp. 1992).

According to these courts, the peculiar nature of real property generally removes it from the "exigent circumstances" exception under *Fuentes*. Courts that have applied the *Mathews* test have likewise concluded that due process requires a prior hearing before seizure of real property.

In *United States v. 4492 S. Livonia Rd.*,[36] the government sought forfeiture of a 120-acre parcel of land with a house on it.[37] The government applied for and was granted a seizure warrant after an ex parte proceeding before a magistrate.[38] The property owner claimed that the statute was unconstitutional because he was not afforded an adversarial hearing prior to the seizure of his real property.[39] The Second Circuit held that due process generally requires a hearing prior to the deprivation of property in the absence of "exigent circumstances."[40] Noting that a person's home, unlike some forms of property, cannot be readily moved or dissipated, the Second Circuit concluded that pre-seizure notice and hearing would not frustrate the purpose of the statute.[41]

The Second Circuit recently extended its holding in *Livonia* to real property used for business purposes. In *United States v. All Assets of Statewide Auto Parts, Inc.*,[42] the government seized an auto parts business allegedly engaging in money-laundering activities.[43] Relying on *Livonia,* the court held that the ex parte pre-seizure hearing was unconstitutional.[44] The court reasoned that the private interest at stake in the case was significant because the entire business was shut down.[45] In contrast, the government's narrow interest was in obtaining pre-notice seizure of a fixed item like a home, not the broad interest in enforcing the laws, since the latter would also be served by forfeiture after an adversarial proceeding.[46] Therefore, the court concluded that the balancing of the *Mathews* factors favored a prior hearing.

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36. 889 F.2d 1258 (2d Cir. 1989) [hereinafter *Livonia*].

37. *Id.* at 1260. The government pursued its action under 21 U.S.C.A. § 881(a)(7) (West Supp. 1993), which makes real property subject to civil forfeiture. *Id.*

38. *Id.*

39. *Id.* at 1261.

40. *Id.* at 1265.

41. *Id.*

42. 971 F.2d 896 (2d Cir. 1992).

43. *Id.* at 899.

44. *Id.* at 905.

45. *Id.* at 902.

46. *Id.* at 903 (quoting *Livonia,* 889 F.2d 1258, 1265 (2d Cir. 1989)).

The Ninth Circuit similarly held in *United States v. James Daniel Good Property*[47] that seizing an owner's home without a pre-seizure hearing violates due process.[48] The court noted that, under due process analysis, real property is distinct from personal property because the owner cannot remove real property from the jurisdiction as it could personal property.[49] The court found that the owner's substantial and unique interest in a home outweighed the government's interest in avoiding a pre-seizure hearing.[50] Thus, the home owner was entitled to an opportunity to be heard before a home was seized.[51]

Some federal courts have allowed seizure of real property in the forfeiture context without prior notice or hearing. In *United States v. 900 Rio Vista Blvd,*[52] the Eleventh Circuit, in a cursory treatment of the due process issue, interpreted *Calero-Toledo* as holding that no prior judicial determination is required when the government seizes items subject to forfeiture.[53] Thus, the Eleventh Circuit permitted seizure of homes without a prior hearing. Similarly, in *United States v. 26.075 Acres,*[54] a federal district court held that seizure of property subject to forfeiture is, in itself, an extraordinary situation under *Fuentes* sufficient to postpone notice and a hearing.[55]

B. Tellevik v. Real Property

The Washington Legislature adopted the Uniform Controlled Substances Act in 1971.[56] The Act covers the regulation and distribution of controlled substances and the enforcement of penalties against substance abuse. In 1988, the Legislature added real property to the list

47. 971 F.2d 1376 (9th Cir. 1992), *cert granted,* 113 S. Ct. 1576 (U.S. Mar. 22, 1993).

48. *Id.* at 1384. In this case, the government obtained the seizure warrant through an ex parte proceeding where the magistrate made the determination based on the affidavit of a law enforcement officer. *Id.* at 1382.

49. *Id.* at 1383.

50. *Id.* The court reasoned that since the house was not going anywhere, any legitimate interest the government had could be protected through means less restrictive than seizure. *Id.*

51. *Id.*

52. 803 F.2d 625 (11th Cir. 1986).

53. *Id.* at 632.

54. 687 F. Supp. 1005 (E.D.N.C. 1988), *aff'd in part, sub nom.* United States v. Santoro, 864 F.2d 1538 (4th Cir. 1989).

55. *See also* United States v. Certain Real Estate Property, 612 F. Supp. 1492, 1496 (S.D. Fla. 1985).

56. WASH. REV. CODE ANN. § 69.50.101-608 (West 1985).

of property subject to forfeiture.[57] *Tellevik* is the first Washington Supreme Court case on due process issues in real property forfeiture.

Tellevik consolidated two forfeiture cases. In the first of the consolidated cases, *Tellevik v. 9209 218th N.E.,* the Washington State Patrol executed a search warrant for a home on October 27, 1989, and found a marijuana growing operation.[58] On April 6, 1990, Tellevik, Chief of the Washington State Patrol, applied ex parte for a warrant of arrest in rem.[59] The trial court refused to issue a warrant, interpreting Washington Revised Code section 69.50.505(a)(8) to permit a seizure only when the property is currently being used in violation of the statute.[60] The Washington Court of Appeals denied the state's motion for discretionary review and the trial court dismissed the suit.[61]

In the second case, *Tellevik v. Real Property Known As 31641 West Rutherford Street,* the State Patrol executed a search warrant for a home on September 26, 1989, and also found a marijuana growing operation.[62] On April 13, 1990, Tellevik filed a complaint for forfeiture in rem against the real property under the same statute and was granted at an ex parte proceeding a warrant to seize the property.[63] The owners of the property then moved to challenge the constitutionality of the forfeiture statute, whereupon the trial court quashed the warrant of arrest in rem.[64] The state directly appealed to the Washington Supreme Court.[65]

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57. WASH. REV. CODE ANN. § 69.50.505(a) (West Supp. 1992) provides in pertinent part:

(a) The following are subject to seizure and forfeiture and no property right exists in them:

....

(8) All real property, including any right, title, and interest in the whole of any lot or tract of land, and any appurtenances or improvements which are being used with the knowledge of the owner . . . in violation of this chapter . . . and a substantial nexus exists between the commercial production or sale of the controlled substance and the real property . . . .

58. Tellevik v. Real Property, 120 Wash. 2d 68, 72–73, 838 P.2d 111, 113 (1992).

59. *Id.* at 73, 838 P.2d at 113. WASH. REV. CODE ANN. § 69.50.505(b) (West Supp. 1992) provides in pertinent parts:

Real . . . property subject to forfeiture under this chapter may be seized by any board inspector or law enforcement officer of this state *upon process issued by any superior court* having jurisdiction over the property. Seizure of real property shall include the filing of a lis pendens by the seizing agency.

(Emphasis added). The seizure of real property establishes in rem jurisdiction over the property.

60. *Tellevik,* 120 Wash. 2d at 73, 838 P.2d at 113.

61. *Id.*

62. *Id.* at 74, 838 P.2d at 113–14.

63. *Id.* at 74, 838 P.2d at 114.

64. *Id.* at 74–75, 838 P.2d at 114.

65. *Id.* at 75, 838 P.2d at 114.

The Washington Supreme Court held that section 69.50.505(b) was not unconstitutional on its face or as applied.[66] The *Tellevik* court concluded that the *Fuentes* test of "exigent circumstances" did not apply because the property owners were afforded a hearing prior to the deprivation.[67] According to the court, *Fuentes* requires only some kind of hearing prior to deprivation.[68] While conceding that a majority of federal courts have required evidentiary hearings before the government could seize homes,[69] the *Tellevik* court determined that these federal courts misinterpreted the interplay between *Fuentes* and *Mathews*.[70] The *Tellevik* court concluded that *Fuentes* does not apply where, as in this case, an ex parte proceeding preceded the seizure.[71] The *Tellevik* court reasoned that *Fuentes* is only relevant if no prior hearing of any type was held.[72]

The *Tellevik* court then applied the *Mathews* balancing test and found that while the private and governmental interests were significant in this case, the risk of erroneous deprivation was slight given the documentary nature of the bases of probable cause.[73] First, the temporary impact on the private interest of the temporary seizure of the home and the rental property in these cases, while significant, was less than that of a permanent or physical dispossession of the property.[74] Second, the risk of erroneous deprivation under the Washington forfeiture statute was minimal because probable cause was based upon police affidavits after valid searches which showed that "a substantial nexus exist[ed] between the commercial production or sale of the controlled substance and the

66. *Id.* at 87, 838 P.2d at 121.

67. *Id.* at 85, 838 P.2d at 120.

68. *Id.* at 83, 838 P.2d at 119.

69. *See supra* notes 35–55 and accompanying text.

70. *Tellevik*, 120 Wash. 2d at 83, 838 P.2d at 118. According to the *Tellevik* court, the *Livonia* court misapplied *Fuentes* to the *Mathews* test by "assessing the strength of the government's interest" in terms of whether the "case presented exigent circumstances warranting the postponement of notice and the opportunity for an adversarial hearing." *Id.* (citing *Livonia*, 889 F.2d 1258, 1265 (2d Cir. 1989)).

71. *Id.* at 85, 838 P.2d at 120.

72. *Id.*

73. *Id.* at 87, 838 P.2d at 120.

74. *Id.* at 86, 838 P.2d at 120. According to the court, seizure of real property establishes only an inchoate property interest in the seizing agency and does not allow the seizing agency to deprive the occupants of physical possession. *Id.* at 85, 838 P.2d at 120. The court relied heavily on the fact that claimants are entitled to a full adversarial hearing within 90 days if they contest the seizure under WASH. REV. CODE ANN. § 69.50.505(e). *Id.* at 86, 838 P.2d at 120.

real property."[75] According to the court, the documented evidence provided an objective basis from which to determine whether the standard in Washington Revised Code section 69.50.505(a)(8) had been met.[76] Finally, without elaborating on the issue, the *Tellevik* court concluded that the government had a significant interest in seizing the property to prevent its continued use for illegal activity, relying on the legislative declaration that forfeiture provides a significant deterrent to drug crimes.[77]

The majority opinion drew a vigorous dissent by Justice Johnson. He argued that when exigent circumstances are absent, the government's interest in seizing real property through ex parte procedures must give way to the property owner's interest.[78] Justice Johnson concluded that, under the *Mathews* balancing test, a pre-seizure adversarial hearing was required in the absence of exigent circumstances.[79] First, the real property owner's interest was significant because the seizure intruded upon property ownership rights.[80] Second, the ex parte procedures created a considerable risk that real property would be erroneously seized because real property forfeiture cases involve factual inquiries as to the owner's knowledge of the illegal activities.[81] Third, the government's interest in seizing real property through ex parte procedures was minimal because the government's interest in seizing property to deter illegal drug use will not be affected by requiring an adversarial hearing rather than an ex parte proceeding.[82]

II. CRITIQUE OF *TELLEVIK v. REAL PROPERTY*

The *Tellevik* court erred by deciding that federal due process did not require a hearing before real property could be seized. The *Tellevik* court drew erroneous conclusions from *Fuentes* and its progeny and wrongly

75. *Id.* at 86, 838 P.2d at 120.

76. *Id.*

77. *Id.* at 86–87, 838 P.2d at 120.

78. *Id.* at 93, 838 P.2d at 124 (Johnson, J., dissenting).

79. *Id.* at 100, 838 P.2d at 128.

80. *Id.* at 95–96, 838 P.2d at 125.

81. *Id.* at 97, 838 P.2d at 126. According to the dissent, "knowledge issues are not 'ordinary uncomplicated matters' susceptible to documentary proof; rather, they involve fact-intensive determinations based on evaluating circumstantial evidence." *Id.* (citing Reardon v. United States, 947 F.2d 1509, 1519 (1st Cir. 1991)).

82. *Id.* at 98–100, 838 P.2d at 126–28. Justice Johnson also determined that requiring adversarial pre-seizure hearings would not involve undue financial or administrative burdens. *Id.*

applied the *Mathews* balancing test to the facts of the case. The *Tellevik* court should have distinguished between personal property and real property in determining what process is due in forfeiture cases. In light of the *Tellevik* decision, the Legislature should amend the statute to require a full evidentiary hearing.

A. The Tellevik *Court Drew Erroneous Inferences from* Fuentes

Contrary to the *Tellevik* court's assertions, *Fuentes* does not stand for the proposition that only some kind of hearing is required under the due process clause. Rather, *Fuentes* and its progeny require a full evidentiary hearing, absent exigent circumstances, given at a meaningful time and at a meaningful place so that the deprivation can still be prevented.[83] The *Tellevik* court assumed that an ex parte proceeding was a hearing for purposes of due process analysis. This, however, is not what the *Fuentes* Court intended because the statutes held unconstitutional in *Fuentes* required ex parte hearings before attachment.[84]

The essence of due process is to provide the person whose property interest is at risk with a hearing where a neutral official can make an informed evaluation.[85] The purpose of the hearing is not for the government to be heard, but for the person who is about to lose his or her property to be heard. Accordingly, the Supreme Court in *Fuentes* did not consider an ex parte proceeding a hearing for purposes of due process analysis.[86] However, in *Tellevik,* the property owners were not even given an opportunity to be present at the ex parte proceeding, let alone heard. Thus, the *Tellevik* court's holding cannot be reconciled with the reasoning of the *Fuentes* line of cases.

The *Tellevik* court's holding also runs counter to the Supreme Court's recent opinion in *Doehr.* In *Doehr,* the Court again held that an ex parte proceeding before attachment of property violated the owner's due process rights.[87] Like the statute in *Fuentes,* the statute in *Doehr* required an ex parte proceeding prior to attachment.[88] In concluding that

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83. *See supra* notes 7–14 and accompanying text.

84. Fuentes v. Shevin, 407 U.S. 67, 83 (1972); *see supra* notes 8–9 and accompanying text.

85. *See Fuentes,* 407 U.S. at 83.

86. *See* Mathews v. Eldridge, 424 U.S. 324, 334 (1976) (stating that *Fuentes* requires something more than an ex parte proceeding prior to attachment of property).

87. Connecticut v. Doehr, 111 S. Ct. 2105, 2116 (1991); *see supra* notes 22–29 and accompanying text.

88. *Doehr,* 111 S. Ct. at 2110. The superior court judge made the probable cause finding on the basis of the plaintiff 's affidavit. *Id.*

due process requires a hearing before attachment, the Supreme Court clearly referred to a full evidentiary hearing, rather than an ex parte proceeding since there had been an ex parte proceeding prior to the attachment of the property.[89] The *Livonia* court applied the *Fuentes* analysis in the forfeiture seizure context.[90] Hence, the *Fuentes* analysis squarely applies to situations in which an ex parte proceeding precedes the deprivation.

B. The Tellevik *Court Wrongly Applied the* Mathews *Balancing Test*

The *Tellevik* court wrongly applied the *Mathews* balancing test to the facts in the case. First, the property owners' interests were significant, despite the temporary effect of seizure. Second, the risk of erroneous deprivation under the Washington statute was substantial because the facts in forfeiture proceedings are not readily susceptible to documentary proof. Third, the government's interests were minimal. A balancing of the three factors weighs in favor of a full evidentiary hearing.

1. The Property Owners' Interests Were Significant

In *Tellevik,* the property owners' interests were significant. By characterizing the seizure as establishing an inchoate property interest having less impact than that of a permanent or physical dispossession of the property, the *Tellevik* court implied that such "temporary impact" gave the property owners less constitutional protection.[91] This position, however, cannot be squared with the recent Supreme Court decision in *Doehr* where the Court afforded due process protection to just such "temporary impact" from a prejudgment attachment.[92] Because real property owners in both seizure and attachment cases suffer temporary deprivation of property rights, the reasoning and analysis in *Doehr* should also apply in forfeiture seizure cases. Therefore, the interests of

89. *Id.*

90. *See supra* notes 36–41 and accompanying text.

91. Tellevik v. Real Property, 120 Wash. 2d 68, 85–86, 838 P.2d 111, 120 (1992).

92. The Court reiterated that it "has never held that only such extreme deprivations trigger due process concerns. To the contrary, our cases show that even the temporary or partial impairments to property rights that attachment, liens, and similar encumbrances entail are sufficient to merit due process protection." *Doehr,* 111 S. Ct. at 2113 .

real property owners in forfeiture cases are at least equally, if not more, significant than in prejudgment attachment cases.[93]

Although the government in a forfeiture proceeding may enter into an occupancy agreement with the property owners, allowing them to remain in the house pending the forfeiture proceeding,[94] the seizure of the home can substantially infringe upon owners' interests in privacy and other rights. For example, an occupancy agreement may restrict the owner's use of the property, render the owner liable for damages to the property, and even provide for governmental entry and inspection.[95] Similarly, a filing of a lis pendens clouds the title to the property by limiting the owner's power to alienate the property.[96] Consequently, the effects of a seizure and an attachment are virtually indistinguishable. Moreover, as the *Tellevik* court conceded, a homeowner's expectation of privacy and freedom from governmental intrusion merits special constitutional protection.[97] Therefore, the *Tellevik* court's attempt to downplay the effect of seizure on real property owners' rights under the *Mathews* test is not convincing.

2. *The Substantial Risk of Erroneous Deprivation in Forfeiture Cases Favors a Pre-Seizure Hearing*

The *Tellevik* court's assertion that the risk of erroneous deprivation in this case was minimal belies the reality of civil forfeiture cases. To seize property under the Washington forfeiture statute, the government must prove that the defendant knew of the illegal activity. However, knowledge issues are generally not subject to documentary proof. Thus, the risk of erroneous deprivation in an ex parte proceeding is substantial. Further, that the government bears a low substantive standard of proof in a forfeiture case, as compared to a criminal case, is more reason for courts to provide real property owners with more procedural safeguards. In addition, the forfeiture statute does not provide adequate immediate

93. Unlike attachment cases, real property owners under forfeiture seizure face possible eviction by the government.

94. *Tellevik*, 120 Wash. 2d at 86, 838 P.2d at 120. The rental property owners were also allowed to continue to collect rent. *Id.*

95. *In re* Kingsley, 802 F.2d 571, 579 (1st Cir. 1986).

96. The filing of a lis pendens is required by Washington Revised Code section 69.50.505(b). For a detailed analysis of the effect of lis pendens on property rights, see Comment, *supra* note 29, at 1075.

97. *Tellevik*, 120 Wash. 2d at 83, 838 P.2d at 119 (citing United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1264 (2d Cir. 1989) which cites United States v. Karo, 468 U.S. 705, 714 (1984)).

post-seizure safeguards against erroneous deprivation. Therefore, the second part of the *Mathews* test also weighs in favor of requiring a pre-seizure hearing in order to comply with the mandate of due process.

The *Tellevik* court's assertion that the probable cause issue concerns "uncomplicated matters that lend themselves to documentary proof"[98] runs counter to the requirements of the Washington forfeiture statute. Under the Washington statute, the judge in a pre-seizure hearing must make a finding that the defendants knew of the illegal activity.[99] Yet, knowledge issues are not "uncomplicated matters," such as the existence of debt or payment delinquencies, that are susceptible to documentary proof. Rather, they involve fact-intensive determinations based on evaluating circumstantial evidence.[100] Without a full evidentiary hearing at which the defendants can assert defenses and cross-examine witnesses, the granting of the government's request of a seizure is almost a foregone conclusion.[101] The most effective way to minimize erroneous deprivation is to use the adversary system to establish probable cause for seizure of property.

The risk of erroneous deprivation under the Washington forfeiture statute is substantial because of the low standard of proof required of the government and lack of procedural protection offered. The forfeiture statute requires the government to show only that a substantial nexus exists between the property and the drug violation.[102] The government does not have to prove the nexus even by a preponderance of the evidence and the government may show probable cause through rank

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98. *Tellevik*, 120 Wash. 2d at 86, 838 P.2d at 120 (quoting Connecticut v. Doehr, 111 S. Ct. 2105, 2114 (1991) which quotes Mitchell v. W.T. Grant Co., 416 U.S. 600, 609, (1974)).

99. *Tellevik*, 120 Wash. 2d at 97, 838 P.2d at 126 (Johnson J., dissenting). For the text of the statute, see *supra* note 57.

100. *Tellevik*, 120 Wash. 2d at 97 (Johnson, J., dissenting) (citing Reardon v. United States, 947 F.2d 1509, 1519 (1st Cir. 1991)).

101. As the *Doehr* Court noted:

> The likelihood of error that results illustrates that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."

Doehr, 111 S. Ct. at 2114 (1991) (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring)).

102. For the text of the statute, see *supra* note 57. In forfeiture cases, federal courts have rejected the accepted notion in criminal cases that the due process clause requires the government to prove beyond a reasonable doubt that the defendant has committed the crime he or she is charged with. *See* United States v. $2,500 in U.S. Currency, 689 F.2d 10, 12 (2d Cir. 1982) (upholding shifting of burden in civil forfeiture of drug proceeds because in rem forfeiture is not criminal), *cert. denied*, 465 U.S. 1099 (1984).

hearsay.[103] Moreover, the government can seek criminal prosecution of the property owner before, during, or after a civil forfeiture proceeding, and courts have refused to find any resulting violation of the Fifth Amendment prohibition on double jeopardy.[104] Finally, governments at both the state level and the federal level may prosecute the property owner in two separate proceedings.[105] Given the egregious results of forfeiture and the low constitutional protection afforded the property owners in forfeiture trials, courts must provide the real property owners with every procedural protection mandated by the Constitution. Indeed, courts have voiced their concern and frustration at the government's increasing and virtually unchecked use of the forfeiture statutes and the disregard of due process buried in those statutes.[106] Therefore, requiring a full evidentiary hearing prior to the seizure of real property serves as an effective safeguard against erroneous deprivation by the government.

The Washington forfeiture statute contains inadequate post-seizure safeguards against erroneous deprivation. Only where adequate post-deprivation procedural safeguards exist has the Supreme Court allowed outright deprivation without a prior hearing.[107] However, no such safeguards exist in the Washington statute. The *Tellevik* court interpreted Washington Revised Code section 69.50.505(e) as requiring a full adversarial hearing within ninety days if the owner contests the seizure.[108] Yet, a closer look at the statute reveals that it contains no such requirement. Although the statute provides that a person filing a claim within ninety days shall be afforded a hearing, it does not set any time limit for holding the hearing.[109] In courts with crowded civil calendars,

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103. United States v. One 1986 Nissan Maxima GL, 895 F.2d 1063, 1064–65 (5th Cir. 1990); *see also* United States v. $4,255,625.39, 762 F.2d 895 (11th Cir. 1985) (upholding forfeiture of alleged drug proceeds on the basis of the sheer amount of money involved and the fact that the events took place in Miami and the bank account was maintained by a corporation with Colombian affiliations), *cert. denied*, 474 U.S. 1056 (1986). *But see* United States v. $12,390.00, 956 F.2d 801, 812 (8th Cir. 1992) (Beam, J., dissenting in part) (arguing that the facts used by the government have to meet the requirements of the federal rules of evidence). For a good summary of this area of the law, see generally T.J. Hiles, *Civil Forfeiture of Property for Drug Offenders Under Illinois and Federal Statutes: Zero Tolerance, Zero Exceptions*, 25 J. MARSHALL L. REV. 389 (1992).

104. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (holding that forfeiture actions following a criminal acquittal do not constitute double jeopardy).

105. United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 904 (2d Cir. 1992).

106. *See, e.g., id* at 905; *see also* United States v. 632–636 Ninth Avenue, 798 F. Supp. 1540, 1551 (N.D. Ala. 1992).

107. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

108. Tellevik v. Real Property, 120 Wash. 2d 68, 86, 838 P.2d 111, 121 (1992).

109. Washington Revised Code section 69.50.505(e) provides, in pertinent part:

this portended safeguard may prove to be a nullity if the seizure hearing is later combined with the hearing on the forfeiture action, since the property owner has to respond to the seizure within ninety days or suffer the risk of forfeiture by default.[110] The end result is that these provisions do not provide any immediate post-seizure safeguards against the temporary deprivation of the property.

3. *The* Tellevik *Court Gave Improper Weight to the Government's Interest*

The *Tellevik* court failed to distinguish between the government's general interest in fighting the war on drugs and its specific interest in seizing real property without a prior hearing. Viewed from the latter perspective, the government's interest in *Tellevik* is outweighed by that of the real property owner. Moreover, the law enforcement agency's built-in conflict of interest under the statute further diminishes the government's interest. Therefore, the court should require the government to provide a full evidentiary hearing before seizing the property under the *Mathews* balancing test.

There is no doubt that the government has a significant interest in fighting the drug war. The issue here, however, is whether the government achieves any significant public goal by denying a pre-seizure hearing for real property owners. The court failed to look at the government's interest in affording the defendants a full hearing prior to the seizure versus its interest in not so doing. The government's interest in the seizure of the real property is that such a seizure serves to commence the forfeiture proceeding.[111] Viewed this way, the government's interest is very limited, thus not significant.[112] The broad

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> If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection . . . (a)(8) of this section within . . . ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right.

110. Real property forfeiture actions are initiated by the filing of a summons and complaint for forfeiture. Besides, Washington Revised Code section 69.50.505(d) provides that:

> If no person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection . . . (a)(8) of this section within . . . ninety days in the case of real property, the item seized shall be deemed forfeited.

111. *See* WASH. REV. CODE ANN. § 69.50.505(c) (West Supp. 1992).

112. A great majority of federal courts that have considered the government's interest under the *Mathews* balancing test have found that the government interest is limited to seizure without prior hearing, not the government's general interest in the ultimate forfeiture of the property. *See supra*

interest of the government in preventing and deterring drug dealing will be served whether the seizure occurs before or after an adversarial proceeding.[113] Therefore, the government has a limited interest in initiating the seizure proceeding.[114]

Moreover, "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"[115] also militate in favor of a full hearing before seizure of real property. The Due Process Clause mandates an opportunity to be heard, not an actual hearing.[116] In the present case, all the government has to do to comply with due process is to give the real property owner notice and an opportunity to show up and put forth a defense. Furthermore, if the government could wait for more than six months before it started the seizure proceeding,[117] it certainly could afford the property owners reasonable time to challenge the government's deprivation. Thus, the government's interest here is minimal while the additional burden on it to fulfill the promise of due process under the Constitution is light.

The court should not overlook that law enforcement agencies stand to gain directly from the forfeiture of property. Under Washington Revised Code section 69.50.505(f), the seizing law enforcement agency may retain the real property for its own use or sell the forfeited property to cover the expenses of the government's investigation.[118] An ex parte application for a seizure warrant tests no more than the government's "own belief in its own rights."[119] Since the government's self-interest is

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note 46 and accompanying text; *see also* United States v. James Daniel Good Property, 971 F.2d 1376, 1384 (9th Cir. 1992) (concluding that the government's interest in avoiding a pre-seizure hearing is not significant), *cert. granted,* 113 S. Ct. 1576 (U.S. Mar. 22, 1993); United States v. Certain Real Estate Property, 612 F. Supp. 1492, 1497 (S.D. Fla. 1985) ("Public policy is not a catch-all justification for shortchanging property owners of their due process protection under the constitution.").

113. United States v. Parcel I, Beginning at a Stake, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990).

114. As the dissent in *Tellevik* correctly points out, with an adversarial hearing, the state would still be able to initiate forfeiture proceedings, provide a significant deterrent to drug trafficking, and enhance revenue to partially defray crime control costs but, at the same time, protect the individual homeowner from an erroneous deprivation of property rights. Tellevik v. Real Property, 120 Wash. 2d 68, 98, 838 P.2d 111, 127 (1992) (Johnson, J., dissenting).

115. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see supra* note 17 and accompanying text.

116. Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971).

117. *Tellevik,* 120 Wash. 2d at 72–74, 838 P.2d at 113–14.

118. *See* WASH. REV. CODE ANN. § 69.50.505(f).

119. Fuentes v. Shevin, 407 U.S. 67, 84 (1972).

at stake here,[120] the danger is substantial that the government's confidence in its own cause could be misplaced.[121] Thus, the government's interest under the *Mathews* test is further diminished because the government's action serves no significant public interest while the law enforcement agency benefits directly from the deprivation.

C. *Courts Should Distinguish Between Real Property and Personal Property*

1. *Real Property Is Fundamentally Distinguishable in Terms of Determining Whether Exigent Circumstances Exist*

In forfeiture seizure proceedings involving real property, exigent circumstances rarely exist to justify seizing real property without prior hearing under *Fuentes* because real property, unlike personal property, cannot be moved out of a court's jurisdiction. The Ninth Circuit made this distinction in *United States v. James Daniel Good Property.*[122] When real property is the subject of seizure, no prompt action is necessary because the land is not going anywhere.[123] Requiring a pre-seizure notification and an opportunity for a full hearing will not frustrate the government's interest in asserting jurisdiction over the property. Accordingly, the "exigent circumstances" analysis in *Calero-Toledo*[124] generally does not apply in real property seizure cases.[125] Thus, in forfeiture seizure cases, the court should treat real property as distinct

120. *See* United States v. 632–636 Ninth Avenue, 798 F. Supp. 1540, 1551 (N.D. Ala. 1992) (arguing that law enforcement agencies have a "built-in" conflict-of-interest because they share in the product of the seizure).

121. *See Fuentes,* 407 U.S. at 83.

122. 971 F.2d 1376, 1383 (9th Cir. 1992), *cert granted,* 113 S. Ct. 1576 (U.S. Mar. 22, 1993); *see also Livonia,* 889 F.2d 1258, 1263–65 (2d Cir. 1989).

123. *James Daniel Good Property,* 971 F.2d at 1384. The court reasoned that "[t]he home will be there when the government decides to initiate forfeiture proceedings. The home will be there when the government delivers notice of its intent. Finally, the home will still be there for seizure if the government is successful on the merits of its action." *Id.* at 1383; *cf.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The *Calero-Toledo* Court placed heavy emphasis on the mobility factor which the Court found to be an "extraordinary situation." *Id.* at 680.

124. *See supra* notes 30–34 and accompanying text.

125. Exceptions to this rule would exist where the real property is continuously used for illegal purposes. Another example of an "exigent circumstance" would be where the owner tries to sell the property. *See* Connecticut v. Doehr, 111 S. Ct. 2105, 2115 (1991) (concluding that the plaintiff 's interest was minimal because there was no allegation that Doehr was about to make the property unavailable to satisfy a judgment).

from personal property and afford real property owners an opportunity for a prior hearing under due process.

2. *Legislative History Supports Drawing a Distinction Between Real and Personal Property*

When the Washington State Legislature added real property to the list of property subject to forfeiture in 1988,[126] it provided real property owners more protection from seizure and forfeiture than personal property owners. First, in cases involving personal property the burden of production is on the property owner, while in cases involving real property the burden of production as well as the burden of persuasion are on the law enforcement agency.[127] Second, the statute gives personal property owners forty-five days to petition for a hearing on the merits, but ninety days for real property owners.[128] Finally, the Legislature is very much aware of the severity of real property seizure and has cautioned against its abuse.[129] Thus, courts should adhere to the legislative intent and distinguish real property from personal property in providing real property owners their fundamental procedural due process rights. Such a distinction removes real property from the *Calero-Toledo* analysis. Given the result of the *Tellevik* case, the Legislature should amend the statute to provide an opportunity for a full evidentiary hearing before the government can deprive an owner of his or her real property.

III. CONCLUSION

By holding that the government's seizure of real property through an ex parte proceeding complied with the Due Process Clause of the federal Constitution, the Washington Supreme Court wrongly applied the due process analysis set forth in previous United States Supreme Court cases, thus abridging the constitutional rights of real property owners. The

126. Rozner v. Bellevue, 116 Wash. 2d 342, 804 P.2d 24, 26 (1991) (citing 1988 Wash. Laws 1312).

127. Washington Revised Code section 69.50.505(e) provides in pertinent part:

> . . . In cases involving personal property, the burden of producing evidence shall be upon the person claiming to be the lawful owner or the person claiming to have the lawful right to possession of the property. In cases involving real property, the burden of producing evidence shall be upon the law enforcement agency.

128. *Id.*

129. For example, the Washington Legislature "recognizes that seizure of real property is a very powerful tool and should not be applied in cases in which a manifest injustice would occur as a result of forfeiture of an innocent spouse's community property interest." 1989 Wash. Laws 1298.

court should have read into the forfeiture statute a requirement of notice and an opportunity to be heard before the government can deprive a property owner of his or her property. In light of the decision of this case, the Legislature should amend the statute by inserting a requirement for an opportunity for a full evidentiary hearing prior to the seizure of real property.