

tions. The Department contends that it qualifies as a so-called innocent owner of the property, thereby exempting the sales tax proceeds from forfeiture under 21 U.S.C. § 881(a)(6).

This argument misapprehends the fact that forfeiture occurs before any property interest in a sales tax "trust" arises. The innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for the forfeiture. *United States v. One Parcel of Real Estate*, 660 F.Supp. at 487; *cf. Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir.1976) (applying same principle to 49 U.S.C. § 782). The sales tax trust alleged in this case does not exist until the vendor receives value from the purchaser. The Colorado statute upon which the Department relies clearly states that the trust applies to all "sums of money *paid* by the purchaser to the retailer" and that such payments do not become "public money" until they are "in the hands of such retailer." Colo.Rev.Stat. § 39-26-118(1).

In contrast, forfeiture under section 881 occurs before value is received by the vendor. Section 881(a)(6) applies to "[a]ll moneys, negotiable instruments, securities, or other things of value *furnished or intended to be furnished by any person in exchange for a controlled substance.*" 21 U.S.C. § 881(a)(6). Forfeiture therefore occurs while the value is still in the hands of the purchaser, at the moment when the purchaser manifests intent to exchange value for a controlled substance.

We find that the Colorado Department of Revenue is not an innocent owner for purposes of section 881(a)(6) because the title to such property vested in the United States through forfeiture prior to any ownership interest held by the State. Because we find that the state sales tax liens are not exempt from forfeiture, we need not address whether the district court erred in requiring that the Department of Revenue establish that retail, and not wholesale, sales were involved.

III.

We hold that the property at issue in this case should be forfeited to the United States and that title in the United States

relates back to the time of the illegal drug transaction, thereby defeating all competing claims to the property. The district court did not enter an order of forfeiture for the apparent reason that such an order would be futile if superior claims would exhaust the property. From the stipulated facts, we see no reason why such an order should not be granted. We therefore REVERSE and REMAND to the district court with direction to enter an order of forfeiture in favor of the United States and to direct such other action as may be appropriate and consistent with this opinion.



Greg SOLOMON, Patricia Beckwith, Raleigh Brinson, and Earl Jennings, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

LIBERTY COUNTY, FLORIDA, Gene Free, Chairman, Commissioner, Joe Burke, Commissioner, James E. Johnson, Commissioner, J.L. Johnson, Commissioner, John T. Sanders, Commissioner, their successors and agents, all in their official capacities, Defendants-Appellees.

Gregory SOLOMON, Patricia Beckwith, Raleigh Brinson and Earl Jennings, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

LIBERTY COUNTY SCHOOL BOARD, FLORIDA, Ras Hill, Chairman, Joseph Combs, Tommy Duggar, W.L. Potter, Herbert Whittaker, members of the Liberty County School Board, their successors and agents, all in their official capacities, Defendants-Appellees.

No. 87-3406.

United States Court of Appeals,
Eleventh Circuit.

April 26, 1989.

David M. Lipman, Lipman & Weisberg,
Miami, Fla., for plaintiffs-appellants.

Jack F. White, Jr., Hal A. Davis, Quincy, Fla., for defendants-appellees.

Appeals from the United States District Court for the Northern District of Florida.

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING
IN BANC

(Opinion December 12, 1988, 11th Cir.,
1988, 865 F.2d 1566.)

Before RONEY, Chief Judge,
TJOFLAT, HILL, FAY, VANCE,
KRAVITCH, JOHNSON, HATCHETT,
ANDERSON, CLARK, EDMONDSON
and COX, Circuit Judges.

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing in banc and a majority of the judges of this court in active service having voted in favor of granting a rehearing in banc,

IT IS ORDERED that the above causes shall be reheard by this court in banc *with* oral argument during the week of June 5, 1989, on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of in banc briefs. The previous panel's opinion is hereby VACATED.



Jessie Joseph TAFERO,
Petitioner-Appellant,

v.

Richard DUGGER, Secretary of Florida
Department of Corrections,
Respondent-Appellee.

No. 88-5198.

United States Court of Appeals,
Eleventh Circuit.

May 1, 1989.

Rehearing and Rehearing In Banc
Denied June 12, 1989.

State prisoner sought habeas corpus relief from first-degree murder conviction.

The United States District Court for the Southern District of Florida, No. 88-6156-Civ., Lenore Carrero Nesbitt, J., 681 F.Supp. 1531, denied petition. Prisoner appealed. The Court of Appeals held that: (1) prisoner's failure to raise claim in state court that sentencing instructions diminished jurors' sense of responsibility barred him from raising claim in habeas corpus proceeding; (2) ends of justice did not require consideration of successive petition alleging ineffective assistance of counsel; and (3) state sentencing court's failure to consider and to instruct jury to consider nonstatutory mitigating factors was harmless.

Affirmed.

1. Habeas Corpus ⇄340

Prisoner's failure to raise claim in state court that sentencing instructions in capital case diminished jurors' sense of responsibility barred him from raising claim in federal habeas corpus proceeding, even though sentencing preceded United States Supreme Court case on diminishing jurors' sense of responsibility; Florida law at time of sentencing provided claim similar to that provided by Supreme Court case. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

2. Habeas Corpus ⇄894

Ends of justice did not require consideration of successive petition alleging ineffective assistance of counsel in capital murder prosecution, where prisoner consented to his counsel's decision not to present mitigating circumstances and was not prejudiced. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254; 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 6.

3. Homicide ⇄311, 357(4), 343

State sentencing court's failure to consider and failure to instruct jury to consider nonstatutory mitigating factors was harmless in capital murder prosecution; aggravating factors consisted of commission of murders while on parole, history of