No. 08-351

IN THE
Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ, TYHESHA BRUNSTON, MICHELLE WALDO, KIRK YUNKER and TONY WILLIAMS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

LIST OF PARTIES

The parties to the proceeding below were defendant Richard A. Devine, in his official capacity as the former State's Attorney of Cook County, Illinois ("former State's Attorney Devine"), defendants City of Chicago, Philip J. Cline, Superintendent of Police (the "City Defendants")[1] (collectively "Defendants") and plaintiffs/respondents Chermane Smith, Edmanuel Perez, Tyhesha Brunston, Michelle Waldo, Kirk Yunker and Tony Williams ("Respondents"). Mr. Devine was the State's Attorney of Cook County, Illinois until he was succeeded in office by Anita Alvarez on December 1, 2008. Ms. Alvarez is the current State's Attorney of Cook County and is the petitioner in this appeal.

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1. On April 24, 2009, counsel for the City Defendants sent a letter to the Clerk of the Supreme Court notifying the Court that the City Defendants adopt and support the position of the Petitioner in this case. The City Defendants also noted that Jody P. Weis has succeeded Philip J. Cline as Superintendent of the Chicago Police department and, under Supreme Court Rule 35.3, is automatically substituted for Mr. Cline as a party.

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OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit reversed the decision of the United States District Court for the Northern District of Illinois granting Defendants' motions to dismiss. The Seventh Circuit's opinion is reported at 524 F.3d 834 (7th Cir. 2008) and is reprinted in Petitioner's Appendix at 1a. The district court's order granting former State's Attorney Devine's motion to dismiss is unpublished and is reprinted in Petitioner's Appendix at 12a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which Petitioner Anita Alvarez, State's Attorney of Cook County ("Petitioner") seeks review was issued on May 2, 2008. (Pet. App. at 1a.) On July 3, 2008, the United States Court of Appeals for the Seventh Circuit granted Petitioner's motion to recall the case and stay the issuance of the mandate pending the filing of the subject petition in this Court. (Joint App. at 14a.)

The petition for writ of *certiorari* was filed on September 15, 2008. This Court granted the petition on February 23, 2009. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

725 ILCS 5/108-11 (2009)

> Disposition of things seized. The court before which the instruments, articles or things are returned shall enter an order providing for their custody pending further proceedings.

725 ILCS 5/108-12 (2009)

> Disposition of obscene material. In the case of any material seized which is alleged to have been possessed or used or intended to be used contrary to, or is evidence of a violation of, Section 11-20 of the "Criminal Code of 1961", approved July 28, 1961, as heretofore and hereafter amended [720 ILCS 5/11-20], the court before which the material is returned shall, upon written request of any person from whom the material was seized or any person claiming ownership or other right to possession of such material, enter an order providing for a hearing to determine the obscene nature thereof not more than 10 days after such return. If the material is determined to be obscene it shall be held pending further proceedings as provided by Section 108-11 of this Code [725 ILCS 5/108-11]. If the material is determined not to be obscene it shall be returned to the person from whom or place from which it was seized, or to the person claiming ownership or other right to possession of such material; provided

that enough of the record material may be retained by the State for purposes of appellate proceedings. The decision of the court upon this hearing shall not be admissible as evidence in any other proceeding nor shall it be *res judicata* of any question in any other proceeding.

725 ILCS 5/114-12 (2009)

Motion to Suppress Evidence Illegally Seized. (a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that:

(1) The search and seizure without a warrant was illegal; or

(2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; there was not probable cause for the issuance of the warrant; or, the warrant was illegally executed.

(b) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant. If the

motion is granted the property shall be restored, unless otherwise subject to lawful detention, and it shall not be admissible in evidence against the movant at any trial.

(1) If a defendant seeks to suppress evidence because of the conduct of a peace officer in obtaining the evidence, the State may urge that the peace officer's conduct was taken in a reasonable and objective good faith belief that the conduct was proper and that the evidence discovered should not be suppressed if otherwise admissible. The court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer who acted in good faith.

(2) "Good faith" means whenever a peace officer obtains evidence:

(i) pursuant to a search or an arrest warrant obtained from a neutral and detached judge, which warrant is free from obvious defects other than non-deliberate errors in preparation and contains no material misrepresentation by any agent of the State, and the officer reasonably believed the warrant to be valid; or

(ii) pursuant to a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional or otherwise invalidated.

(3) This amendatory Act of 1987 shall not be construed to limit the enforcement of any appropriate civil remedy or criminal sanction in actions pursuant to other provisions of law against any individual or government entity found to have conducted an unreasonable search or seizure.

(4) This amendatory Act of 1987 does not apply to unlawful electronic eavesdropping or wiretapping.

(c) The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. If the motion is made during trial, and the court determines that the motion is not untimely, and the court conducts a hearing on the merits and enters an order suppressing the evidence, the court shall terminate the trial with respect to every defendant who was a party to the hearing and who was within the scope of the order of suppression, without further proceedings, unless the State files a written notice that there will be no interlocutory appeal from such order of suppression. In the event of such termination, the court shall proceed with the trial of other defendants not thus affected. Such termination of trial shall be proper and shall not bar subsequent prosecution of the identical charges and defendants; however, if after such termination the State fails to prosecute the interlocutory appeal until a

> determination of the merits of the appeal by the reviewing court, the termination shall be improper within the meaning of subparagraph (a) (3) of Section 3-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended [720 ILCS 5/3-4], and subsequent prosecution of such defendants upon such charges shall be barred.
>
> (d) The motion shall be made only before a court with jurisdiction to try the offense.
>
> (e) The order or judgment granting or denying the motion shall state the findings of facts and conclusions of law upon which the order or judgment is based.

725 ILCS 150/2 (2009)

> Legislative Declaration. The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to or facilitates the manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. While forfeiture may secure for State and local units of government some resources for

> deterring drug abuse and drug trafficking, forfeiture is not intended to be an alternative means of funding the administration of criminal justice. The General Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom.

725 ILCS 150/5 (2009)

> Notice to State's Attorney. The law enforcement agency seizing property for forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq*.], the Cannabis Control Act [720 ILCS 550/1 *et seq*.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq*.] shall, within 52 days of seizure, notify the State's Attorney for the county in which an act or omission giving rise to the forfeiture occurred or in which the property was seized of the seizure of the property and the facts and circumstances giving rise to the seizure and shall provide the State's Attorney with the inventory of the property and its

> estimated value. When the property seized for forfeiture is a vehicle, the law enforcement agency seizing the property shall immediately notify the Secretary of State that forfeiture proceedings are pending regarding such vehicle.

725 ILCS 150/6 (2009)

> Non-Judicial Forfeiture. If non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or if real property is seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq.*], the Cannabis Control Act [720 ILCS 550/1 *et seq.*], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*], the State's Attorney shall institute judicial *in rem* forfeiture proceedings as described in Section 9 of this Act [725 ILCS 150/9] within 45 days from receipt of notice of seizure from the seizing agency under Section 5 of this Act [725 ILCS 150/5]. However, if non-real property that does not exceed $ 20,000 in value excluding the value of any conveyance is seized, the following procedure shall be used:
>
> (A) If, after review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure from the seizing agency, the State's Attorney shall cause notice of

pending forfeiture to be given to the owner of the property and all known interest holders of the property in accordance with Section 4 of this Act [725 ILCS 150/4].

(B) The notice of pending forfeiture must include a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

(C)(1) Any person claiming an interest in property which is the subject of notice under subsection (A) of Section 6 of this Act [725 ILCS 150/6] may, within 45 days after the effective date of notice as described in Section 4 of this Act [725 ILCS 150/4], file a verified claim with the State's Attorney expressing his or her interest in the property. The claim must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provision of law relied on in asserting the property is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the relief sought.

(2) If a claimant files the claim and deposits with the State's Attorney a cost bond, in the form of a cashier's check payable to the clerk of the court, in the sum of 10 percent of the reasonable value of the property as alleged by the State's Attorney or the sum of $ 100, whichever is greater, upon condition that, in the case of forfeiture, the claimant must pay all costs and expenses of forfeiture proceedings, then the State's Attorney shall institute judicial *in rem* forfeiture proceedings and deposit the cost bond with the clerk of the court as described in Section 9 of this Act [725 ILCS 150/9] within 45 days after receipt of the claim and cost bond. In lieu of a cost bond, a person claiming interest in the seized property may file, under penalty of perjury, an indigency affidavit.

(3) If none of the seized property is forfeited in the judicial *in rem* proceeding, the clerk of the court shall return to the claimant, unless the court orders otherwise, 90% of the sum which has been deposited and shall retain as costs 10% of the money deposited. If any of the seized property is forfeited under the judicial forfeiture proceeding, the clerk of the court shall transfer 90% of the sum which has been deposited to the State's Attorney prosecuting the civil forfeiture to be applied to the costs of prosecution and the clerk shall retain as costs 10% of the sum deposited.

(D) If no claim is filed or bond given within the 45 day period as described in subsection (C) of Section 6 of this Act [725 ILCS 150/6], the State's Attorney shall declare the property forfeited and shall promptly notify the owner and all known interest holders of the property and the Director of the Illinois Department of State Police of the declaration of forfeiture and the Director shall dispose of the property in accordance with law.

725 ILCS 150/8 (2009)

Exemptions from forfeiture. A property interest is exempt from forfeiture under this Section if its owner or interest holder establishes by a preponderance of evidence that the owner or interest holder:

(A)(i) in the case of personal property, is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur, or

(ii) in the case of real property, is not legally accountable for the conduct giving rise to the forfeiture, or did not solicit, conspire, or attempt to commit the conduct giving rise to the forfeiture; and

(B) had not acquired and did not stand to acquire substantial proceeds from the conduct giving rise to its forfeiture other than as an interest holder in an arms length commercial transaction; and

(C) with respect to conveyances, did not hold the property jointly or in common with a person whose conduct gave rise to the forfeiture; and

(D) does not hold the property for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture, and, if the owner or interest holder acquired the interest through any such person, the owner or interest holder acquired it as a bona fide purchaser for value without knowingly taking part in the conduct giving rise to the forfeiture; and

(E) that the owner or interest holder acquired the interest:

(i) before the commencement of the conduct giving rise to its forfeiture and the person whose conduct gave rise to its forfeiture did not have the authority to convey the interest to a bona fide purchaser for value at the time of the conduct; or

(ii) after the commencement of the conduct giving rise to its forfeiture, and the owner or interest holder acquired the interest as a mortgagee, secured creditor, lienholder, or bona fide purchaser for value without knowledge of the conduct which gave rise to the forfeiture; and

(a) in the case of personal property, without knowledge of the seizure of the property for forfeiture; or

(b) in the case of real estate, before the filing in the office of the Recorder of Deeds of the county in which the real estate is located of a notice of seizure for forfeiture or a lis pendens notice.

725 ILCS 150/9 (2009)

Judicial *in rem* procedures. If property seized under the provisions of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], the Cannabis Control Act [720 ILCS 550/1

et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq.*] is non-real property that exceeds $ 20,000 in value excluding the value of any conveyance, or is real property, or a claimant has filed a claim and a cost bond under subsection (C) of Section 6 of this Act [725 ILCS 150/6], the following judicial *in rem* procedures shall apply:

(A) If, after a review of the facts surrounding the seizure, the State's Attorney is of the opinion that the seized property is subject to forfeiture, then within 45 days of the receipt of notice of seizure by the seizing agency or the filing of the claim and cost bond, whichever is later, the State's Attorney shall institute judicial forfeiture proceedings by filing a verified complaint for forfeiture and, if the claimant has filed a claim and cost bond, by depositing the cost bond with the clerk of the court. When authorized by law, a forfeiture must be ordered by a court on an action *in rem* brought by a State's Attorney under a verified complaint for forfeiture.

(B) During the probable cause portion of the judicial *in rem* proceeding wherein the State presents its case-in-chief, the court must receive and consider, among other things, all relevant hearsay evidence and information. The laws of evidence relating to civil actions shall apply to all other portions of the judicial *in rem* proceeding.

(C) Only an owner of or interest holder in the property may file an answer asserting a claim against the property in the action *in rem*. For purposes of this Section, the owner or interest holder shall be referred to as claimant.

(D) The answer must be signed by the owner or interest holder under penalty of perjury and must set forth:

(i) the caption of the proceedings as set forth on the notice of pending forfeiture and the name of the claimant;

(ii) the address at which the claimant will accept mail;

(iii) the nature and extent of the claimant's interest in the property;

(iv) the date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(v) the name and address of all other persons known to have an interest in the property;

(vi) the specific provisions of Section 8 of this Act [725 ILCS 150/8] relied on in asserting it is not subject to forfeiture;

(vii) all essential facts supporting each assertion; and

(viii) the precise relief sought.

(E) The answer must be filed with the court within 45 days after service of the civil *in rem* complaint.

(F) The hearing must be held within 60 days after filing of the answer unless continued for good cause.

(G) The State shall show the existence of probable cause for forfeiture of the property. If the State shows probable cause, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(H) If the State does not show existence of probable cause or a claimant has established by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order the interest in the property returned or conveyed to the claimant and shall order all other property forfeited to the State. If the State does show existence of probable cause and the claimant does not establish by a preponderance of evidence that the claimant has an interest that is exempt under Section 8 of this Act [725 ILCS 150/8], the court shall order all property forfeited to the State.

(I) A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense

of which the defendant was convicted in any proceeding under this Act regardless of the pendency of an appeal from that conviction. However, evidence of the pendency of an appeal is admissible.

(J) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Act; however, for good cause shown, on a motion by the State's Attorney, the court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment or information alleging a violation of the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq*.], the Cannabis Control Act [720 ILCS 550/1 *et seq*.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 *et seq*.]. Such a stay shall not be available pending an appeal. Property subject to forfeiture under the Illinois Controlled Substances Act [720 ILCS 570/100 *et seq*.], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 et seq.] shall not be subject to return or release by a court exercising jurisdiction over a criminal case involving the seizure of such property unless such return or release is consented to by the State's Attorney.

(K) All property declared forfeited under this Act vests in this State on the commission of the conduct giving rise to forfeiture together

> with the proceeds of the property after that time. Any such property or proceeds subsequently transferred to any person remain subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing under the provisions of this Act that the transferee's interest is exempt under Section 8 of this Act [725 ILCS 150/8].
>
> (L) A civil action under this Act must be commenced within 5 years after the last conduct giving rise to forfeiture became known or should have become known or 5 years after the forfeitable property is discovered, whichever is later, excluding any time during which either the property or claimant is out of the State or in confinement or during which criminal proceedings relating to the same conduct are in progress.

765 ILCS 1030/1 (2009)

> This Act is applicable to all personal property of which possession is transferred to a police department or other law enforcement agency of the State or a county, city, village or incorporated town, under circumstances supporting a reasonable belief that such property was abandoned, lost or stolen or otherwise illegally possessed, except property seized during a search, and retained and ultimately returned, destroyed or otherwise disposed of pursuant to order of a court in

accordance with Section 108-11, 108-12 or 114-12 of the "Code of Criminal Procedure of 1963" [725 ILCS 5/108-11, 725 ILCS 5/108-12, or 725 ILCS 5/114-12] or other law hereafter applicable to property thus retained, and except property of which custody and disposition is prescribed by Article II of Chapter 4 of The Illinois Vehicle Code [625 ILCS 5/4-201 *et seq.*].

765 ILCS 1030/2 (2009)

(a) Such property believed to be abandoned, lost or stolen or otherwise illegally possessed shall be retained in custody by the sheriff, chief of police or other principal official of the law enforcement agency, which shall make reasonable inquiry and efforts to identify and notify the owner or other person entitled to possession thereof, and shall return the property after such person provides reasonable and satisfactory proof of his ownership or right to possession and reimburses the agency for all reasonable expenses of such custody.

(b) Weapons that have been confiscated as a result of having been abandoned or illegally possessed may be transferred to the Department of State Police for use by the crime laboratory system, for training purposes, or for any other application as deemed appropriate by the Department, if no legitimate claim is made for the confiscated

> weapon within 6 months of the date of confiscation, or within 6 months of final court disposition if such confiscated weapon was used for evidentiary purposes.

765 ILCS 1030/5 (2009)

> The owner or other person entitled to possession of such property may claim and recover possession of the property at any time before its sale at public auction, upon providing reasonable and satisfactory proof of ownership or right to possession and reimbursing the law enforcement agency for all reasonable expenses of custody thereof.

STATEMENT OF THE CASE

I. Background.

Illinois' Drug Asset Forfeiture Procedure Act ("DAFPA" or the "Act") directs police departments to notify their jurisdiction's State's Attorney within 52 days of the seizure of any property pursuant to the Illinois Controlled Substances Act, 720 ILCS 570/100 (2009), or the Cannabis Control Act, 720 ILCS 550/1 (2009). *See generally* 725 ILCS 150/5 (2009).

Upon receiving notice from a police department, the State's Attorney has 45 days to elect whether to initiate civil forfeiture proceedings. *See* 725 ILCS 150/6(A) (2009). If an *in rem* forfeiture action is initiated, the State's Attorney must provide notice to the owner of the property and all known interest holders before the

45 days elapse. *Ibid*. As required by statute, the notice includes a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action.

Pursuant to the Act, owners of personal property not exceeding $20,000 in value who wish to contest forfeiture (like Respondents in this case) may file a verified claim and post a cost bond. Such action triggers a judicial proceeding in which the State must establish probable cause for forfeiture of the property. *See* 725 ILCS 150/6(C) (2009); 725 ILCS 150/9 (2009). Unless continued for good cause, this hearing must be convened within 60 days after the property owner files an answer to the complaint. 725 ILCS 150/9(F) (2009). One form of "good cause" that the Act recognizes is the pendency of related criminal charges. 725 ILCS 150/9(J) (2009).

Within this judicial hearing, property owners may assert an affirmative defense that the subject property is exempt from forfeiture. 725 ILCS 150/8 (2009). Under Section 8 of DAFPA, for example, an interest in personal property is exempt from forfeiture if the property owner or interest holder can establish by a preponderance of evidence that he or she "is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/8(A)(i) (2009).

Here, Respondents filed a complaint alleging that their respective due process rights were violated

because DAFPA itself did not mandate an immediate post-seizure probable cause hearing prior to the statutory judicial forfeiture proceeding. In this regard, Respondents' class action complaint asked the district court to declare that DAFPA was unconstitutional as applied to Respondents.

II. Proceedings Below.

On November 22, 2006, Respondents filed a class action complaint against former State's Attorney Devine and the City Defendants alleging a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 1983. (Joint App. at 30a.) Respondents also filed a motion for class certification. (Joint App. at 37a.) The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On February 16, 2007, the City Defendants filed a motion to dismiss Respondents' Class Action Complaint. (Joint App. at 41a and 43a.) On February 20, 2007, State's Attorney Devine also filed a motion to dismiss this complaint. (Joint App. at 66a and 69a.) In these motions to dismiss, Defendants argued that Respondents' proposed class action complaint should be dismissed based upon the Seventh Circuit's decision in *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994).

In *Jones*, the Seventh Circuit held that under *United States v. $8,850*, 461 U.S. 555, 564 (1983), district courts should apply the speedy trial test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the delay in the initiation of a civil forfeiture proceeding

violated due process. *Jones*, 38 F.3d at 324. The *Jones* plaintiffs argued that *$8,850* was distinguishable because it focused "on whether the length of delay in initiation of the actual forfeiture proceeding violates the requirements of due process." *Ibid.* In contrast, the *Jones* plaintiffs contended that due process required a preliminary determination of probable cause because the forfeiture proceeding would not occur for some time. *Ibid. Jones* concluded that under this Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), this argument was legally untenable. *Jones*, 38 F.3d at 324.

On February 21, 2007, Respondents filed a response to the motions to dismiss acknowledging that *Jones* was controlling precedent that defeated the claim. Respondents conceded that "*Jones* is the governing precedent in this District and that *Jones* cannot be distinguished in any meaningful way from Plaintiffs' case." (Joint App. at 75a.) Respondents argued that *Jones* conflicted with "*United States v. James Daniel Good Realty*, 510 U.S. 43 (1993) and *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006)" but "recognize[d] that the Court is currently bound by *Jones*." (Joint App. at 75a.)

On February 22, 2007, the district court granted defendants' motions to dismiss, specifically referring to Respondents' counsel's admission that the court was bound by *Jones*. (Pet. App. at 12a.) As the application of the *Barker* speedy trial test to determine whether any of the Respondents could establish a due process violation was highly individualized and not suitable for class treatment, the district court dismissed Respondents' motion for class certification as moot. (Pet. App. at 12a.)

On May 2, 2008, the Court of Appeals for the Seventh Circuit issued an opinion reversing the decision of the district court. *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008); (Pet. App. at 1a).[2] The Seventh Circuit rejected its previous analysis in *Jones*, declined to follow *$8,850* and *Von Neumann* and instead applied the three-part due process test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether DAFPA violated due process. The Seventh Circuit held that DAFPA facially violated the Due Process Clause because it did not provide for an interim, adversarial hearing after the seizure of personal property but before the civil forfeiture hearing. (Pet. App. at 10a.) The Seventh Circuit stated that "some sort of mechanism to test the validity of the retention of the property is required." (Pet. App. at 10a.)

On May 16, 2008, former State's Attorney Devine filed a petition for rehearing. (Joint App. at 13a.) The Seventh Circuit denied this petition. (Joint App. at 13a.) Thereafter, the Seventh Circuit recalled the case and stayed issuance of the mandate pending this Court's disposition of the case. (Joint App. at 14a.)

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2. The Seventh Circuit noted that its decision "signal[ed] a reversal of course from *Jones*" and, thus, the opinion was circulated to the full court before release in accordance with Seventh Circuit Rule 40(e). (Petitioner's App. at 11a.)

SUMMARY OF THE ARGUMENT

The Seventh Circuit held that DAFPA violates the Due Process Clause of the Fourteenth Amendment because it fails to provide for a prompt, adversarial "postseizure/preforfeiture" hearing to test the validity of the seizure and provide for release on bond of the seized property. (Pet. App. at 1a-11a) Specifically, the circuit court indicated that because an "innocent owner can be without his car for months or years without a means to contest the seizure or even to post a bond to obtain its release" (Pet. App. at 8a), the Constitution required the creation of an entirely new proceeding: an interim adversarial hearing to be held within days of the seizure. As such, the court remanded the matter to the district court to "fashion appropriate procedural relief consistent with [its] opinion." (Pet. App. at 10a)

Nothing in the purpose of the Due Process Clause, the history of civil forfeiture in the United States or previous decisions from this Court compels this result. Accordingly, the Seventh Circuit's decision should be reversed as it is inconsistent with not only the common law origins of *in rem* forfeiture, but also this Court's well-established precedent that the judicial forfeiture hearing provides all the process that is due under the Constitution since its sole function is to determine whether there was probable cause for the seizure and whether the property should be returned to the owner. *See*, *e.g*. *Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 318 (1818) ("Where property is seized and libelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not."). For nearly 200 years, this Court has held that a separate proceeding to determine

the reasonableness of the seizure, prior to the forfeiture hearing itself, was unnecessary to protect the claimant's property interests. *See United States v. Von Neumann*, 474 U.S. 242, 249-51 (1986); *United States v. $8,850*, 461 U.S. 555, 564-69 (1983); *Gelston*, 16 U.S. (3 Wheat) at 312; *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817). The Seventh Circuit unjustifiably reported from this precedent.

The Seventh Circuit's requirement of an interim hearing was unnecessary for another reason: Illinois law, like federal law, already provides property owners with various mechanisms to petition the government for the return of wrongfully seized personal property. *See*, *e.g.*, 765 ILCS 1030/1 (2009); 765 ILCS 1030/5 (2009); 725 ILCS 5/108-11 (2009); 725 ILCS 114-12(a) (2009); *People v. Moore*, 410 Ill. 241, 251, 102 N.E.2d 146, 151 (1951) and *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971). As such, any harm an individual claimant suffers from a delay in instituting forfeiture proceedings can be ameliorated without declaring DAFPA unconstitutional on its face.

Because this Court explicitly held in *Von Neumann* and *$8,850* that any challenge to the length of the delay in commencing the forfeiture hearing should be analyzed under the four factor speedy-trial test of *Barker v. Wingo*, 407 U.S. 514 (1972), the Seventh Circuit also erred when it looked to this Court's decisions in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), to support its decision that such an interim hearing was required. *Good* involved the question of whether notice of a pending forfeiture is required prior to the seizure of real property, a point thoroughly distinct from the instant case which only involves personal property (cars

and cash). While *Mathews* provides a framework for addressing procedural due process claims when little or no precedent exists addressing what process is due in a particular situation, the procedures applicable to *in rem* forfeiture proceedings are grounded in centuries of common law and constitutional tradition.

Moreover, once personal property is seized, the paramount due process concern is not the notice provided pre-seizure but rather the delay prior to the post-seizure hearing. *$8,850*, 461 U.S. at 562, 563 (noting that a "postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time.") The *Barker* due process analysis specifically considers the length and reason of such a delay. The *Mathews* three-part due process test does not.

Significantly, the Seventh Circuit's requirement of an interim hearing does not come without a cost. The scheduling of such an interim hearing within days of seizure threatens the rights of innocent owners unaware of the seizure of their personal property and potentially forces the State to engage in an adversarial proceeding long before the police have had the opportunity to complete their investigation. Also, in both the interim hearing and the subsequent civil forfeiture hearing, the parties would have the same respective burdens of proof; *i.e.*, if the State meets its burden of establishing probable cause for the forfeiture, the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture. 725 ILCS 150/9(G).

The Due Process Clause does not mandate the type of interim, adversarial hearing contemplated by the lower court. Accordingly, and for the reasons set forth below, this Court should reverse the judgment of the Seventh Circuit.

ARGUMENT

The Seventh Circuit held that the Due Process Clause of the Fourteenth Amendment requires an interim "postseizure/preforfeiture" hearing to test the validity of the seizure and provide for release on bond of the seized property. (Pet. App. at 9a-10a.) Specifically, the court ruled that because DAFPA allows the seizing police agency up to 52 days to complete its investigation and notify the State's Attorney and then provides the State's Attorney an additional 45 days to either notify the owner or institute *in rem* forfeiture proceedings, the Act is unconstitutional because an "innocent owner can be without his car for months or years without a means to contest the seizure or even to post a bond to obtain its release." (Pet. App. at 8a.)[3]

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3. Although the statute authorizes up to 52 days for the police investigation and another 45 days for the State's Attorney's decision on whether to seek forfeiture, due to the unusual procedural posture of this case, Petitioner has not had the opportunity to demonstrate that in actual practice the time frame is considerably shorter. Moreover, although Respondents' complaint sets out an as-applied challenge to DAFPA, the Seventh Circuit erroneously treated it as a facial challenge when it reversed the district court and ordered it to "fashion appropriate procedural relief." (Pet. App. at 10a.)

This holding is, however, inconsistent with not only the common law origins of *in rem* forfeiture, but this Court's well-established precedent regarding both civil asset forfeiture and procedural due process as well. Rather, as the Court has long recognized, due process is a flexible concept which is guided by historical practice, and the mere fact that property rights are implicated does not require the creation of entirely new proceedings where the existing procedures already protect against arbitrary and capricious governmental action. Thus, contrary to the Seventh Circuit's conclusion, no interim "postseizure/preforfeiture" hearing is required. The forfeiture hearing itself not only ensures that probable cause existed for the seizure but also whether the submission of an "innocent owner" defense is sufficient to preclude forfeiture and require the return of the property.

I. The Seventh Circuit's Decision Is Contrary To The Common Law Origins Of Civil Forfeiture.

Civil asset forfeiture in the United States has its roots in early English common law. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974). Specifically, three kinds of forfeiture were established in England at the time of the founding of the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. *See Austin v. United States*, 509 U.S. 602, 613 (1993).

"At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." *Calero-Toledo*, 416 U.S. at 680-81. Deodands have been

attributed to ancient biblical laws (*id.* at 681 n.17, *citing* Exodus 21:28 ("if an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten")), and were premised upon the notion that the King would use the money for charitable uses, such as paying for Masses to be said for the good of the dead man's soul. *Calero-Toledo*, 416 U.S. at 681, *citing* 1 W. Blackstone, *Commentaries* *300. However, "the beneficiary of the deodand was never the kin of the dead victim, but the King, or the local lord or township designated as beneficiary in the Crown's name." J. Finkelstein, *The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death and The Western Notion Of Sovereignty*, 46 TEMPLE L.Q. 169, 182 (1973).

The second kind of common-law forfeiture, known as forfeitures of estate, applied only to those who had been convicted of a felony or of treason. *Austin*, 509 U.S. at 611-12, *citing* 4 W. Blackstone, at *38. "The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo*, 416 U.S. at 682. *See also The Palmyra*, 25 U.S. (12 Wheat) 1, 14 (1827) ("at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown . . . [as] a consequence, of the judgment of conviction"). Such forfeitures were premised on the theory that "property was a right derived from society which one lost by violating society's laws." *Austin*, 509 U.S. at 612, *citing* 1 W. Blackstone, at *299, 382.

English statutes, such as the Navigation Acts of 1660, authorized forfeitures for violations of the customs and revenue laws. *Calero-Toledo*, 416 U.S. at 682. Violations of these statutes resulted in the forfeiture of the illegally carried goods as well as the instrumentalities that transported them. *Austin*, 509 U.S. at 612, *citing* L. Harper, *English Navigation Laws* (1939); *see also United States v. Bajakajian*, 524 U.S. 321, 333 n.8 (1998) (noting that an instrumentality was "historically . . . subject to forfeiture because it was the actual means by which an offense was committed"). Under these statutes, *in rem* proceedings for the forfeiture of items seized on land were conducted in the court of the Exchequer, while seizures on navigable waters led to *in rem* proceedings in the Admiralty courts. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137 (1943).

Deodands did not become part of the common-law tradition of the United States (*Calero-Toledo*, 416 U.S. at 682), and the Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted." U.S. Const., Art. III, § 3, cl. 2. The First Congress also abolished forfeiture of estate as a punishment for felons. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. However, "'long before the adoption of the Constitution the common law courts in the Colonies — and later in the states during the period of Confederation — were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes.'" *Calero-Toledo*, 416 U.S. at 683, *quoting C. J. Hendry Co*, 318 U.S. at 139. The theory behind such forfeitures was the fiction that the action was directed against the "guilty property," rather than against the offender himself. *See Various Items of Personal*

Property v. United States, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."). In this regard, "there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited." *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

Following the ratification of the Constitution, the First Congress enacted legislation authorizing the seizure and forfeiture of ships and cargo involved in customs offenses. *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 119 (1993), *citing* §§ 12, 36, 1 Stat. 39, 47; §§ 13, 14, 22, 27, 67, 1 Stat. 157-159, 161, 163-164, 176. Congress subsequently authorized the seizure of ships engaged in piracy. *See The Palmyra*, 25 U.S. (12 Wheat) at 7, *citing* Act of Congress of the third of March, 1819, ch. 75. Since those modest beginnings, Congress and the States have enacted comprehensive laws authorizing civil forfeiture of both real and personal property involved in criminal offenses, such that "forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo*, 416 U.S. at 683. *See also*, *e.g.*, *Dobbins's Distillery v. United States*, 96 U.S. 395, 400-401 (1878) (forfeiture of a distillery and associated real and personal property for unpaid alcohol taxes); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-512 (1921) (forfeiture of an automobile used to illegally transport alcohol); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (forfeiture of undeclared imported gems); *United States v. One*

Assortment of 89 Firearms, 465 U.S. 354, 364-366 (1984) (forfeiture of unlicensed firearms); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 366-367 (1971) (forfeiture of obscene photographs).

This Court has long recognized that civil forfeiture is "not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature." *89 Firearms*, 465 U.S. at 366. Because the focus of the forfeiture proceeding is the object itself, separate criminal charges against the owner are not required. *Calero-Toledo*, 416 U.S. at 681-86; *The Palmyra*, 25 U.S. (12 Wheat) at 14-15. In fact, neither double jeopardy nor collateral estoppel precludes statutory *in rem* forfeiture proceedings after an individual has been acquitted in a criminal case. *89 Firearms*, 465 U.S. at 361.

Nevertheless, forfeiture statutes work in conjunction with the criminal provisions as the forfeiture of wrongfully-used property, such as conveyances like cars and boats, "fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo*, 416 U.S. at 687; *see also 89 Firearms*, 465 U.S. at 364 (forfeiture of unlicensed firearms "discourag[es] unregulated commerce in firearms" and "remov[es] from circulation firearms that have been used or intended for use outside regulated channels of commerce"); *General Motors Acceptance Corporation v. United States*, 286 U.S. 49, 56 (1932) ("[f]orfeiture of vehicles . . . is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling").

Because the government's right to the property vests "immediately upon the commission of the act" (*United States v. Stowell*, 133 U.S. 1, 16-17 (1890) ("the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed")), and because seizure of the property is a necessary prerequisite to the forfeiture proceedings (*The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815) (Story, J.) ("before judicial cognizance can attach upon a forfeiture *in rem*, under the statute, there must be a seizure")), such property may be seized without prior notice to the owner or first conducting a judicial hearing since it "could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." *Calero-Toledo*, 416 U.S. at 679.

It is, therefore, clear that instrumentality forfeiture is an ancient practice through which property may be seized and then forfeited to the government because it was used to commit or facilitate a criminal offense. Moreover, and cardinally, this Court has long held that the judicial forfeiture hearing itself is sufficient to protect the rights of the interested parties, and that no additional procedures are required.

Specifically, in *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817), the Court held that a state-court lawsuit challenging the seizure and forfeiture of a ship and its cargo by federal agents could not be brought. Rather, as Chief Justice Marshall explained, the rights of the owners of the ship and cargo would be resolved by the forfeiture proceeding conducted in federal court. *Id.* at 10 ("The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy

the property out of the custody of the seizing officer, or of the court having cognizance of the cause."). Recognizing that forfeiture proceedings might be unreasonably delayed following the seizure, the Chief Justice noted that "[i]f the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Ibid.*

Similarly, in *Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 312 (1818), the Court "unanimously adhere[d]" to the rule of *Slocum*, and held that a state court trespass action challenging the legitimacy of a seizure by federal agents could not be brought. As Justice Story explained:

> The reasonableness of this doctrine results from the very nature of proceedings *in rem*. All persons having an interest in the subject matter, whether as seizing officers, or informers, or claimants, are parties or may be parties to such suits, so far as their interest extends. The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture.

Id. at 312-13. The Court, therefore, has long recognized that a separate proceeding, prior to the forfeiture hearing itself, was unnecessary to determine the reasonableness of the initial seizure. *Id.* at 318 ("Where property is seized and libelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not.").

II. The Due Process Analysis In *$8,850* And *Von Neumann* Is Faithful To The Long History of Civil Forfeiture In The United States.

Consistent with the history of civil forfeiture, the decisions in *United States v. $8,850*, 461 U.S. 555 (1983), and *United States v. Von Neumann*, 474 U.S. 242 (1986), hold that the forfeiture hearing itself fully satisfies the demands of the Due Process Clause. As such, nothing in the Constitution requires the creation of additional proceedings to test the validity of the seizure or permit the return of the property prior to the judicial forfeiture hearing.

In *$8,850*, the Court addressed the question of "whether the Government's 18-month delay in filing a civil proceeding for forfeiture of the currency violates the claimant's right to due process of law." 461 U.S. at 556. The claimant asserted that her due process rights were violated when federal customs officials seized currency from her upon her entry into the country, but waited 18 months to commence forfeiture proceedings. *Ibid.* In rejecting the claimant's arguments and affirming the forfeiture judgment, this Court noted that "[u]nlike the situation where due process requires a prior hearing, there is no obvious bright line dictating when a postseizure hearing must occur." *Id.* at 562. Instead, the Court determined that because depriving the claimant of the use of her property while she waits for the government to initiate forfeiture proceedings is similar to a criminal defendant whose liberty is restricted while he's awaiting trial, any concern about the length of time between the seizure and the initiation of the forfeiture hearing "mirrors the concern of undue

delay encompassed in the right to a speedy trial." *Id.* at 564. As such, the Court held that the speedy trial test of *Barker v. Wingo*, 407 U.S. 514 (1972), is the proper mechanism for evaluating a claim of unconstitutional delay in instituting forfeiture proceedings. *Ibid.*

In applying the four-factor *Barker* test — which requires consideration of the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant — to the claimant's due process claim, the Court stressed that "[t]he Government must be allowed some time to decide whether to institute forfeiture proceedings" because "[t]he customs official's decision to seize property is of necessity a hasty one." *Id.* at 565. The Court found that the pendency of criminal proceedings against the claimant further justified the delay because it "might serve to estop later criminal proceedings . . . [or] provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution." *Id.* at 567. Consequently, despite the fact that the "the 18-month delay was a substantial period of time," the Court ruled that the delay was justified and that the claimant's rights were not violated. *Id.* at 569-70.

In *Von Neumann*, the Court evaluated "whether a 36-day delay by the United States Customs Service in responding to a remission petition filed by respondent in response to the seizure of his car by customs agents deprived respondent of property without due process of law." 474 U.S. at 243. The claimant had entered the country without declaring his new car. *Id.* at 245. The

statute authorizing forfeiture allowed the claimant to first pursue an administrative remission prior to judicial forfeiture proceedings. *Id.* at 244. The claimant did so, but did not receive a decision on his remission petition until 36 days after the seizure. *Id.* at 245-46. The Ninth Circuit applied the *Barker* test and held that the claimant's due process rights had been violated, noting that "'special hardships [are] imposed on persons deprived of the use of their automobiles'" and that "prejudice could be established by the inconvenience of being without a vehicle for any length of time." *Id.* at 248-49, *quoting Von Neumann v. United States*, 729 F.2d 657, 661 (9th Cir. 1984).

This Court reversed the circuit court, explaining that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect [the claimant]'s property interest in the car." *Id.* at 249. The Court further held that although the remission procedure was widely utilized since it supplied "both the Government and the claimant a way to resolve a dispute informally rather than in judicial forfeiture proceedings," it was "not *necessary* to a forfeiture determination, and therefore [was] not constitutionally required." *Id.* at 250 (emphasis in original). Despite the claimant's urging of "the importance of automobiles to citizens in this society," the Court ruled that his "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car" or the money he posted as bond. *Id.* at 251.

For nearly 200 years, this Court has recognized that following a seizure of property by law enforcement, the government need not immediately commence forfeiture proceedings, but instead may take the time to complete its investigation. Consistent with this precedent – and, in particular, *$8,850* and *Von Neumann* — Illinois adopted DAFPA in 1990 (*see* Public Act 86-1382, 1990 ILL. ALS 1382 (eff. September 10, 1990)), giving the seizing police agency up to 52 days to complete its investigation and the State's Attorney another 45 days to either notify the interested parties in order to resolve the matter informally or institute *in rem* forfeiture proceedings. Moreover, the Illinois General Assembly likely did not provide for a "postseizure/preforfeiture" hearing because the state courts, like this Court, had made clear that the judicial forfeiture hearing itself is all that is required by the Constitution to protect the claimant's rights. *People v. Glenn*, 142 Ill. App. 3d 1108, 1111, 492 N.E.2d 957, 960 (5th Dist. 1986) (following *$8,850* and holding that under a similar statutory forfeiture scheme, the claimant's due process rights were not infringed by a 12-month lapse between the seizure and the commencement of the forfeiture hearing); *People v. Strong*, 151 Ill. App. 3d 28, 35-36, 502 N.E.2d 744, 749-50 (3rd Dist. 1986) (upholding a forfeiture judgment despite a 63-day delay between the seizure of the property and the filing of the forfeiture complaint).

Nevertheless, in this case, the Seventh Circuit effectively declared DAFPA facially unconstitutional because the judicial forfeiture proceeding might come too late under the statute. The court held that the Due Process Clause of the Fourteenth Amendment requires

the creation of an entirely new procedure: an adversarial, interim "postseizure/preforfeiture" hearing within days of the seizure to test its validity and to provide for release on bond of the seized property. (Pet. App. at 9a-10a.) The Seventh Circuit looked to this Court's decisions in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), to support its decision that such a hearing was required because "[t]he private interest involved, particularly in the seizure of an automobile, is great" and "[t]he hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate." (Pet. App. at 8a.)

In so doing, the Seventh Circuit overlooked the extensive history of *in rem* forfeiture and the longstanding recognition that the forfeiture hearing itself is the proper forum for resolving questions about the legitimacy of the seizure and the return of the property. As this Court stated in *Ownbey v. Morgan*, 256 U.S. 94 (1921):

> The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial

> proceedings. . . . A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law.

Id. at 110-11. *See also id.* at 112 (holding that "[h]owever desirable it is that the old forms of procedure be improved with the progress of time," the Fourteenth Amendment does not "require a State to relieve the hardship of an ancient and familiar method of procedure").

Moreover, even if the historical practices of *in rem* forfeiture were not so well established, neither *Good* nor *Mathews* are properly applied to the question of how quickly a forfeiture hearing must take place following the seizure of personal property. In *Good*, the Court determined that unlike cases involving the *in rem* forfeiture of personal property (which *require* an initial seizure to invoke the court's jurisdiction), "when the *res* is real property . . . the appropriate judicial forum may be determined without actual seizure." *Good*, 510 U.S. at 58, *citing The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815) (Story, J.). The Court held that the Due Process Clause of the Fifth Amendment "requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 62. Thus, unlike cases involving personal property, the Government cannot simply seize the real property first (even if it has a judicial warrant) and then institute the forfeiture proceedings at some later date.

In reaching this conclusion, the Court relied upon *Mathews'* three part test. *Id.* at 53. The Court found that the seizure of a home implicates a significant private interest, and that the risk of an erroneous deprivation was great because the owner could not easily be compensated for the loss. *Id.* at 53-56. Furthermore, the Court determined that unlike situations involving the seizure and forfeiture of personal property, "[r]equiring the Government to postpone seizure until after an adversary hearing creates no significant administrative burden." *Id.* at 59.

The Court explained that real property is inherently distinct from personal property such as cars and yachts, in that it cannot be removed from the jurisdiction, destroyed or otherwise concealed from the authorities. Thus, the "pressing need for prompt action" to protect the Government's interest is missing. *Id.* at 56-57. Further, the Court noted that unlike the long-established precedent regarding the forfeiture of vessels and other movable personal property, the historical record supporting the Government's ability to forfeit real property was far more limited, constituting only a select few cases from the 19th Century, where the Government's interest in obtaining the property was far more significant than it is in more modern times. *Id.* at 59-61.

The entire thrust of this Court's decision in *Good* was the distinction between real and personal property, a distinction which this Court has adhered to in the Fourth Amendment context "practically since the beginning of the Government." *See Carroll v. United States*, 267 U.S. 132, 153 (1925) (recognizing a

"necessary difference between a search of a store, dwelling house or other structure . . . and a search of a ship, motor boat, wagon or automobile . . . because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought"). As a result, the Seventh Circuit erred when it applied *Good* to this case.

In a similar vein, *Mathews* does not apply to the instant case because, unlike situations involving administrative decisions restricting government benefits in the 1960's and 1970's (*see*, *e.g.*, *Mathews*, 424 U.S. at 341-349 (termination of Social Security disability benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits)), the question of what process is due in i*n rem* proceedings was settled long ago. *See United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796). Moreover, while this Court has applied *Mathews* in other contexts, it has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims." *Dusenbery v. United States*, 534 U.S. 161, 167-168 (2002), Rather, where there is well-settled precedent supporting a particular mode of procedure, the Court will adhere to that precedent rather than begin anew by applying *Mathews*. *Ibid.* (rejecting *Mathews* as the proper framework for determining whether a particular method used to give notice satisfied the Due Process Clause where the Court had applied a "more straightforward test of reasonableness under the circumstances" for more than 50 years). *See also Medina v. California*, 505 U.S. 437, 445-446 (1992) (rejecting *Mathews* and instead applying the "far less intrusive" approach of *Patterson v. New York*, 432 U.S. 197 (1977), when deciding whether a

State's allocation of the burden of proof in a competency hearing comports with due process "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition").

Contrary to the Seventh Circuit's assumption, *Mathews* itself demonstrates that the process which is due in civil forfeiture cases is simply the judicial forfeiture hearing itself and that there is no need to conduct any interim "postseizure/preforfeiture" hearing, much less an adversarial one. As this Court stated in *Mathews*, it "consistently has held that some form of hearing is required before an individual is *finally* deprived of a property interest." 424 U.S. at 333 (emphasis added). Accordingly, the Court held that Eldridge was *not* entitled to a hearing prior to the initial termination of his disability benefits, and that an administrative review process that included opportunities for an evidentiary hearing and further appellate and judicial review was sufficient to satisfy the Due Process Clause. *Id.* at 349.

In particular, the Court found that unlike recipients of welfare benefits, who face the loss of the "'very means by which to live'" while they wait for bureaucratic review, the termination of disability benefits does not pose the same type of danger to those receiving assistance because eligibility for disability benefits is "wholly unrelated to the worker's income or support from many other sources." *Id.* at 340, *quoting Goldberg*, 397 U.S. at 264. The Court determined that even though it may take more than a year after the benefits were terminated to complete the administrative review

process and obtain an evidentiary hearing, an evidentiary hearing prior to adverse administrative action was not required because of the existence of other sources of income and assistance. *Id.* at 342-43; *see also id.* at 333 (noting that *Goldberg* was "the only case" in which the Court "held that a hearing closely approximating a judicial trial is necessary").

As this case involves the loss of the use of a car or money for approximately three months while the police and the State's Attorney decide whether or not to institute statutory forfeiture proceedings, the private interest at stake and the risk of erroneous deprivation are not so great as to require the creation of an entirely new interim proceeding, especially one that would essentially duplicate the ultimate forfeiture hearing. Thus, even if *Mathews* rather than *Barker* provides the appropriate analytical framework for addressing these issues, the Seventh Circuit still erred in ruling that DAFPA violated the Due Process Clause based upon Respondents' untested allegations in the complaint. (Pet. App. at 10a.)

In sum, the Seventh Circuit's decision is erroneous and must be reversed because the judicial forfeiture hearing fully protects the claimants' rights, such that an entirely new interim, adversarial proceeding need not be created. As discussed below in Section III, this proposed interim hearing is unnecessary for another reason: Illinois law, like federal law, already provides property owners and other potential claimants with the right to petition the court for the return of seized property.

III. The Constitution Does Not Mandate The Seventh Circuit's Proposed Interim, Adversarial Hearing, A Proceeding That Causes More Problems Than It Allegedly Solves.

The Seventh Circuit attempted to distinguish *$8,850* and *Von Neumann* on the grounds that the federal statute in *Von Neumann* allowed for the filing of a petition for remission while DAFPA did not provide property owners with a procedure for seeking their property prior to the statutory civil forfeiture hearing. (Pet. App. at 7a.) The Seventh Circuit was incorrect. Illinois law — like federal law — allows property owners to petition for the return of personal property they contend the government wrongfully seized. *See*, *e.g.*, 765 ILCS 1030/1 (2009); 765 ILCS 1030/5 (2009); 725 ILCS 5/108-11 (2009); *People v. Moore*, 410 Ill. 241, 251, 102 N.E.2d 146, 151 (1951) and *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971).

$8,850 and *Von Neumann* correctly concluded that the *Barker* speedy trial factors were best suited to resolve any due process concerns related to the adjudication of civil forfeiture actions. Such concerns, as this Court has recognized, relate to delay and the potential loss of use of property. *See $8,850*, 461 U.S. at 564. The speedy trial test, and not the three-part due process test from *Mathews*, is best suited to address this issue because it focuses on the circumstances surrounding any such delays, considers the prejudice to the property owner and balances the needs of the individual property owner and the government.

In light of the respective burdens of proof in a civil forfeiture hearing under DAFPA, the interim hearing that the Seventh Circuit ordered does nothing more than speed up the civil forfeiture hearing itself and force the State to present its case before the seizing authority has completed its investigation and the State has prepared its case. Nothing in the Constitution compels such an absurd result.

A. The Requirement Of An Interim Hearing Does Nothing More Than Move Up The Date Of The Civil Forfeiture Hearing.

The Seventh Circuit's requirement of an interim hearing does not come without a cost. The scheduling of such an interim hearing within days of seizure threatens the rights of innocent owners unaware of the seizure of their personal property and potentially forces the State to engage in an adversarial proceeding prematurely. The Seventh Circuit did not identify any corresponding benefit associated with this cost, except to observe that automobiles are important in modern society. (Pet. App. at 8a.)

The Due Process Clause does not require such a hearing, particularly where, as here, State law allows the property owner to petition for the return of his or her property. The Seventh Circuit's opinion raises but does not precisely answer another question: what exactly is contemplated to occur at the interim hearing and how is it any different than the ultimate civil forfeiture hearing itself?

A brief review of the respective burdens shows that Respondents' request for an interim probable cause hearing within ten business days of seizure of the property (*see* Joint App. at 36a), is simply a request for the civil forfeiture hearing on a highly expedited basis prior to the police completing their investigation and the State preparing its case. Illinois law provides that "the State shall have the initial burden to show the existence of probable cause for forfeiture of the property." *People v. $1,124,905 United States Currency*, 177 Ill. 2d 314, 326, 685 N.E.2d 1370, 1376 (1997), *citing* ILCS 150/9(G). "During the probable cause portion of the proceeding, 'the court must receive and consider, among other things, all relevant hearsay evidence and information.'" *Id.* at 326-327, 685 N.E.2d at 1376, *citing* 725 ILCS 150/9(B). "The laws of evidence relating to civil actions shall apply to all other portions of the judicial *in rem* proceeding." 725 ILCS 150/9(B). If the State meets its burden of establishing probable cause, then "the burden shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture." *$1,124,905 United States Currency*, 177 Ill. 2d at 326, 685 N.E.2d at 1376, *citing* 725 ILCS 150/9(G). "A claimant may satisfy this burden by establishing one of the innocent-owner defenses listed in the Act." *Ibid. citing* 725 ILCS 150/8. In substance, the adversarial, interim hearing that Respondents requested and the Seventh Circuit required is nothing more than a rushed version of the civil forfeiture hearing itself.

In both the interim hearing and the subsequent civil forfeiture hearing, the parties have the same respective burdens of proof. Consequently, the interim hearing

ordered by the Seventh Circuit and the preliminary hearing outlined in *Gerstein v. Pugh*, 420 U.S. 103 (1975) are not analogous.

In a criminal proceeding, the Fourth Amendment mandates that courts determine probable cause for detaining an arrested person without an adversary hearing. *Gerstein*, 420 U.S. at 120 (holding that a magistrate may decide these issues "in a non-adversary proceeding on hearsay and written testimony" and approving "these informal modes of proof"). If the Fourth Amendment allows such an informal probable cause hearing for deprivation of a person's liberty, it is simply not logical that the Due Process Clause mandates a more involved hearing (*i.e.*, an adversarial, interim hearing) for the alleged deprivation of property used in the commission of a crime (or proceeds from a crime) and subject to an *in rem* civil forfeiture suit. Yet, that is exactly what the Seventh Circuit held.

Gerstein is not analogous to the interim hearing that the Seventh Circuit contemplated for another reason: unlike a *Gerstein* hearing and a subsequent criminal prosecution, the burdens of proof in the interim hearing and the civil forfeiture hearing are exactly the same. *Gerstein* held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991). The State's burden in a *Gerstein* hearing is not proof beyond a reasonable doubt or even proof by a preponderance of the evidence. *See United States v. Funches*, 327 F.3d 582, 587 (7th Cir. 2003) (observing that under *Gerstein*, a finding of

probable cause does not require evidence sufficient to satisfy "a reasonable-doubt or even a preponderance standard."); *see also Gerstein*, 420 U.S. at 121. Of course, proof that the defendant committed a crime must ultimately be beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

In marked contrast, the Seventh Circuit contemplated an interim hearing much different than a *Gerstein* hearing. The Seventh Circuit cited with approval interim hearings in statutory forfeiture schemes from Florida and Arizona. (Pet. App. at 9a.)

Under Florida law, an adversarial preliminary hearing may be requested within 15 days of receipt of the notice of seizure of real or personal property. Fla. Stat. 932.703(2)(a). The Florida statute states that:

> When an adversarial preliminary hearing is held, the court shall review the verified affidavit and any other supporting documents and take any testimony to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act. If probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband. A copy of the findings of the court shall be provided to any person entitled to notice.

Fla. Stat. 932.703(2)(c).

Similarly, in Arizona, an owner or interest holder in the property may request an order to show cause hearing within 15 days of notice of the seizure. A.R.S. § 13-4310. The Arizona statute states that "[t]he law of evidence relating to civil actions applies equally to all parties, including the state, an applicant, a petitioner, a claimant and a defendant, on all issues required to be established by a preponderance of the evidence." A.R.S. § 13-4310(E)(1).

As these Florida and Arizona statutes demonstrate, the Seventh Circuit contemplated an adversarial, interim hearing in which the State's burden of proof would be no different than its burden at the civil forfeiture hearing. Importantly, the State would likely have to proceed in an interim hearing without the benefit of discovery or the completed police investigation. Nothing in the history of civil forfeiture compels such a result.[4]

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4. As discussed more fully below in Section III(B), any analogy between Respondents' claims in the present case and the plaintiffs' claims in *Gerstein* and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), fails for another reason: the seizure of personal property is different than the seizure of a person's liberty. As one district judge aptly observed in an unpublished decision in a predecessor case to *Jones* and *Smith* challenging the constitutionality of a seizure under DAFPA,

> *Riverside* and *Gerstein* involved pretrial custody of a person. The holding of a person without hearing before a criminal proceeding is clearly subject to different standards than the holding of property before a civil forfeiture proceeding. The eleven months for which defendants retained plaintiff

(Cont'd)

B. The Opinion Below Improperly Equated Personal Property With Liberty.

An automobile is an item of personal property. *Dusenbery*, 534 U.S. at 163. It is not, as the Seventh Circuit posits, the functional equivalent of liberty. In this regard, the Seventh Circuit stated:

> The private interest involved, particularly in the seizure of an automobile, is great. Our society is, for good or not, highly dependent on the automobile. The hardship posed by the loss of one's means of transportation, even in a city like Chicago, with a well-developed mass transportation system, is hard to calculate. It can result in missed doctor's appointments, missed school, and perhaps most significant of all, loss of employment. This is bad enough for an owner of an automobile, who is herself accused of a crime giving rise to the seizure. But consider the owner of an automobile which is seized because the driver—not the owner—is the one accused and whose actions cause the seizure. The innocent owner can be without his car for months or years without a means to contest the seizure or even to post a

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(Cont'd)

> Taylor's money is well within the range where courts must apply flexible principles. *Riverside* does not negate the flexible approach mandated [in *$8,850*] for forfeiture proceedings.

Taylor v. O'Malley, 1991 U.S. Dist. LEXIS 19648, *6-*7 (N.D. Ill. December 24, 1991) (Leinenweber, J.).

> bond to obtain its release. It is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal. The person from whom cash is seized also has a strong interest in a hearing, though obviously the posting of a cash bond for cash is an absurdity.

(Pet. App. at 8a-9a.) This analysis is unsound for five reasons.

First, in discussing the importance of an automobile in modern society, the Seventh Circuit did not focus on the need for a preliminary, interim hearing but rather the need for an expedited civil forfeiture proceeding. The Seventh Circuit simply observed that the loss of an automobile can significantly impact a person's everyday life. This observation, however, does not provide a legal basis for requiring an interim, adversarial hearing that essentially duplicates the civil forfeiture hearing. Moreover, as Chief Justice Marshall observed in *Slocum*, a property owner concerned about the government's delay in instituting a forfeiture proceeding may file an equitable action compelling the filing of the forfeiture action or the return of the seized property. *See $8,850*, 461 U.S. at 569, *citing Slocum*, 15 U.S. (2 Wheat) at 10. This is the solution to the problem of the deprivation of the use of seized property, not the Seventh Circuit's mandate of an interim, adversarial hearing.

Second, the Seventh Circuit's approach seemingly presumes that all owners of the seized property are

known at or near the time of seizure, or within a short time thereafter. No basis exists for this presumption. In addition, this presumption runs contrary to the time schedules not only in DAFPA but also in the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983 *et seq*. These time schedules provide months for the seizing authority to report the seizure to the prosecutor and for the prosecutor to file the forfeiture action. Such time periods exist for a reason — to allow the seizing authority to conduct a proper investigation and determine, among other things, the identity of owners, lien holders and any others with an interest in the property. Interestingly, 18 U.S.C. §983(a)(1)(A)(v) provides that:

> If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

CAFRA, therefore, recognizes that the identity of the owner of the seized property may not be known at the time of the seizure. Through its notice requirement, Section 983(a)(1)(A)(v) tacitly acknowledges that the civil forfeiture proceeding need not take place until 60 days after the government determines the identity of the property owner.

Third, in requiring an interim hearing, the Seventh Circuit focused on the plight of an innocent owner whose

personal property was seized and the hardship that could result from prolonged deprivation of the use of the property. This Court has upheld the constitutionality of a Michigan *in rem* forfeiture statute that did not recognize an "innocent owner" defense. *Bennis v. Michigan*, 516 U.S. 442 (1996). Unlike the Michigan statute, however, DAFPA and CAFRA both provide an "innocent owner" defense. *See* 725 ILCS 150/8(A)(i); 18 U.S.C. §983(d). Under DAFPA, an innocent owner may assert the affirmative defense that he or she "is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not reasonably have known of the conduct or that the conduct was likely to occur." 725 ILCS 150/8(A)(i).

The innocent owner would normally assert this defense at the civil forfeiture hearing. Of course, to assert an "innocent owner" defense, a property owner would have to have notice of the seizure and the forfeiture hearing. In addition, the "innocent owner" defense may necessitate that both the State and the claimant conduct discovery. Notice to unknown property owners and discovery sufficient to resolve the case on the merits cannot reasonably take place within ten business days after seizure, the time period in which Respondents contend an interim, adversarial hearing must take place.[5] This hearing does not differ in substance from the civil forfeiture hearing itself but may take place before the police have barely begun their investigation.

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5. Respondents asked the district court to declare that "a postseizure probable cause hearing [must be held] within ten business days of any seizure." (Joint App. at 36a.) The Seventh Circuit discussed a similar time period for such an adversarial interim hearing. (Pet. App. at 9a.)

Such a needlessly expedited hearing could, therefore, lead to a dismissal of the case not because of its lack of merit but because the police had not conducted or completed a thorough investigation. A dismissal under these circumstances would also result in the release of the property to the person using it before the innocent owner received any notice of the seizure and could make a claim on the property. This personal property, which might also be evidence in an ongoing criminal investigation, could then be destroyed, concealed or moved to another jurisdiction.

Fourth, the Seventh Circuit's approach creates a new remedy to fill a non-existent gap in the law. The Seventh Circuit asked "why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal." (Pet. App. at 8a.) Federal and Illinois law already provide property owners with such a remedy: a petition to the government for the return of wrongfully seized personal property. *See Slocum*, 15 U.S. (2 Wheat) at 10; 765 ILCS 1030/1 (2009); 765 ILCS 1030/5 (2009); 725 ILCS 5/108-11 (2009); *People v. Moore*, 410 Ill. 241, 251, 102 N.E.2d 146, 151 (1951) and *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971).

Fifth, the deprivation of personal property is not the same as the deprivation of liberty and does not mandate the interim, adversarial hearing that the Seventh Circuit ordered. This Court has recognized that "the deprivation in *Barker* — the loss of liberty — may well be more grievous than the deprivation of one's use of property." *$8,850*, 461 U.S. at 565, n. 14. It is true

that the Fourth Amendment mandates a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following a warrantless arrest. *Gerstein v. Pugh*, 420 U.S. 103 (1975). It is also true that civil respondents in juvenile proceedings have the same constitutional protections afforded to criminal defendants. *See*, *e.g.*, *In re Gault*, 387 U.S. 1 (1967) (holding that that juvenile delinquency proceedings which may lead to commitment in a state institution must measure up to the essentials of due process and fair treatment); *In re Winship*, 397 U.S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); *Parham* v. *J. R.*, 442 U.S. 584 (1979) (proceedings to commit child to mental hospital must satisfy procedural due process). But in those juvenile proceedings, loss of liberty was at stake, not the loss of property.

The contrast between *Breed* v. *Jones*, 421 U.S. 519 (1975) and *United States v. Ursery*, 518 U.S. 267 (1996), helps illustrate why the Due Process Clause does not mandate an adversarial, interim hearing upon the seizure of personal property. *Breed* held that double jeopardy protection applies to delinquency proceedings. *Ursery*, on the other hand, held that an *in rem* civil forfeiture, where the owner of the property is subject to criminal prosecution, does not violate the Double Jeopardy Clause of the Fifth Amendment. Indeed, "civil *in rem* forfeiture is not punishment of the wrongdoer for his criminal offense." *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring). By analogy, the fact an individual arrested for possession of narcotics is entitled to a *Gerstein* hearing under the Fourth Amendment does not mean that an adversarial, interim hearing must

be held within ten days regarding the civil forfeiture of an automobile used "to make possession of the controlled substance easier." *See People v. 1946 Buick*, 127 Ill. 2d 374, 377, 537 N.E.2d 748, 750 (1989).

In the final analysis, an automobile certainly affords a sense of freedom in the popular sense, but it is clearly not the functional equivalent of liberty in a constitutional sense. The Due Process Clause does not mandate that DAFPA provide an adversarial, interim hearing within ten business days of seizure, particularly where Illinois law already provides statutory and common law procedures for the return of wrongfully seized property.

C. Whether A Particular Seizure Of Personal Property Under DAFPA Satisfies Due Process Must Be Determined On A Case- By-Case Basis.

In contravention of *$8,850*, the Seventh Circuit held that DAPFA facially violated the Due Process Clause because it does not provide for an adversarial, interim hearing within a brief time after seizure. This Court took an entirely different approach in *$8,850* when determining whether the delay from the seizure of personal property to the forfeiture hearing violated due process:

> The flexible approach of *Barker*, which "necessarily compels courts to approach speedy trial cases on an *ad hoc* basis," 407 U.S., at 530, is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met. As we stressed in *Barker*, none of these factors

> is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

$8,850, 461 U.S. at 564-565. While the due process concern related to pre-seizure of real property is notice (*see Good*, 510 U.S. at 53, 54), the due process concern related to a post-seizure of personal property is delay. *$8,850*, 461 U.S. at 562-563.

Unlike the *$8,850*/*Barker* analysis, the Seventh Circuit's approach is markedly inflexible, as it does not take into consideration the speedy trial factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right and (4) the prejudice to the defendant. In *$8,850*, this Court observed that that under *Slocum*, a property owner in a federal forfeiture proceeding could demand the filing of the forfeiture action or the return of the seized property. *Id.* at 569. The Court noted that "[t]he failure to use these remedies can be taken as some indication that [the claimant] did not desire an early judicial hearing." *Ibid.*

The same analysis applies to DAFPA. The apparent failure of prospective claimants in Illinois to petition an Illinois court for return of the property they allege was wrongfully seized (*see* 765 ILCS 1030/5 (2009)) likewise shows that such claimants did not want an early hearing. The Seventh Circuit committed error when it did not apply the *Barker* speedy trial factors to determine

whether DAPFA violates the Due Process Clause. *$8,850* shows that: (i) whether the delay in the initiation of a civil forfeiture hearing under DAFPA violates due process must be determined on a case-by-case application of the *Barker* speedy trial factors and (ii) the Seventh Circuit erroneously concluded that DAFPA facially violated the Due Process Clause.

IV. DAFPA is Modeled After The Comprehensive Drug Abuse Prevention And Control Act of 1970 And Neither Statutory Scheme Facially Violates The Due Process Clause.

The Illinois General Assembly based DAFPA "on the federal civil forfeiture statute and expressly declared its intent 'that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions . . . as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom.'" *People v. A Parcel of Prop. Commonly Known As 1945 N. 31st St., Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 497, 841 N.E.2d 928, 938 (2005). Neither DAFPA nor CAFRA facially violate the Due Process Clause.

A. Both Federal Law And Illinois Law Allow A Property Owner To Seek Return Of Seized Personal Property At Any Time.

Federal law allows property owners to file a petition for remission of seized personal property. *See $8,850*, 461 U.S. at 569 (noting that under *Slocum*, a property owner "can file an equitable action seeking an order compelling the filing of the forfeiture action or return

of the seized property."); 19 U.S.C. § 1618 (authorizing the filing of a petition for remission of property seized under the customs laws); and Federal Rule of Criminal Procedure 41(g) (stating that "a person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return"). So does Illinois law.

Under *Slocum* and its progeny, courts of equity may hear a property owner's petition to compel the filing of the forfeiture action or return of the seized property. *Slocum*, 15 U.S. (2 Wheat) at 9, 10; *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 410, n. 9 (1960). Illinois courts, like all State courts, have inherent equitable authority. *Brundidge v. Glendale Federal Bank*, 168 Ill. 2d 235, 238, 659 N.E.2d 909, 911 (1995) (recognizing the court's "the court's inherent equitable powers.") Under their equitable powers, Illinois courts may hear petitions of property owners seeking the return of wrongfully seized personal property. *People v. Moore*, 410 Ill. 241, 102 N.E.2d 146 (1951); *People v. Kapande*, 23 Ill. 2d 230, 177 N.E.2d 825 (1961).

In *Moore*, the police seized gambling paraphernalia and cash pursuant to a search warrant. Criminal charges were brought against the property owners and the State filed a petition for confiscation of the personal property. The property owners filed an answer to the petition for confiscation and filed their own petition seeking return of the cash. In the criminal trial, the defendants filed a motion to suppress the introduction of the personal property as evidence which the court granted. The court also granted the property owners' petition for the return of the cash. The State appealed. The Illinois

Supreme Court held that "[t]he claim of the defendants to the right of possession of the property and to have the property returned to them is entirely distinct from the right of the State to use the property as evidence in the criminal trial." *Moore*, 410 Ill. at 248, 102 N.E.2d at 150. The court remanded the case for further proceedings to determine whether any of the property was subject to confiscation based upon "the nature of its use at the time of the seizure." *Id.* 410 Ill. at 252, 102 N.E.2d at 152. *See also Kapande*, 23 Ill. 2d at 237, 177 N.E.2d at 829 (following *Moore* and holding that the circuit court has jurisdiction to determine whether seized property is forfeitable contraband and "that such a proceeding is civil in nature").

Moore and *Kapande* are significant for recognizing that Illinois courts may use their equitable powers to hear petitions for the return of wrongfully seized property. In this sense, *Moore* is in accord with the principle set forth in *Slocum* recognizing that courts of equity may hear a property owner's petition seeking the prosecution of a forfeiture action or the return of the seized property.

Under Illinois law, "the equitable powers of a court may not be exercised to direct a remedy in contradiction to the plain requirements of a statute." *McDunn v. Williams*, 156 Ill. 2d 288, 309, 620 N.E.2d 385, 396 (1993). That is, however, not the case here, as the applicable Illinois statutes likewise provide property owners a comprehensive mechanism for seeking the return of wrongfully seized property.

The Illinois Law Enforcement Disposition of Property Act, 765 ILCS 1030/1 et seq. ("LEDPA") applies:

> to all personal property of which possession is transferred to a police department or other law enforcement agency of the State or a county, city, village or incorporated town, under circumstances supporting a reasonable belief that such property was abandoned, lost or stolen or otherwise illegally possessed, except property seized during a search, and retained and ultimately returned, destroyed or otherwise disposed of pursuant to order of a court in accordance with Section 108-11, 108-12 or 114-12 of the [Illinois Code of Criminal Procedure].

765 ILCS 1030/1 (2009). The plain language of this provision shows that LEPDA applies to all personal property of which possession is transferred to the seizing agency "under circumstances supporting a reasonable belief that such property . . . [is] otherwise illegally possessed." 765 ILCS 1030/1 (2009). *See also* 765 ILCS 1030/2 (2009) (recognizing that upon request from the owner of personal property or other person entitled to possession thereof, the government "shall return the property after such person provides reasonable and satisfactory proof of his ownership or right to possession and reimburses the agency for all reasonable expenses of such custody.") Section 5 of LEDPA states that "[t]he owner or other person entitled to possession of such property may claim and recover possession of the property." 765 ILCS 1030/5 (2009). Thus, Section 5 of LEDPA provides a statutory basis for property owners

to petition for the immediate return of personal property seized pursuant to DAFPA.[6]

Section 1 of LEDPA excludes property seized in accordance with Section 108-11, 108-12 or 114-12 of the Illinois Code of Criminal Procedure. Those provisions concern the return of property which is seized pursuant to a search warrant (725 ILCS 5/108-11 (2009); 725 ILCS 5/108-12 (2009)) and property which is seized without a warrant but is the subject of a criminal prosecution (725 ILCS 5/114-12 (2009)).

Section 108-11 allows Illinois courts to release seized property upon petition of the owner. *People v. Canady*, 49 Ill. 2d 416, 423, 275 N.E.2d 356, 360 (1971); *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 402, 336 N.E.2d 759, 764 (1975) (same). *See also* 725 ILCS 5/108-12 (2009) (providing for the disposition of obscene material). Similarly, Section 114-12 specifically provides that

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6. As a practical matter, property owners do not always need to file such a petition to secure the return of their seized property. When the State's Attorney sends a notice of pending forfeiture to the property owner and all known interest holders of the property, the notice includes a description of the property, the estimated value of the property, the date and place of seizure, the conduct giving rise to forfeiture or the violation of law alleged, and a summary of procedures and procedural rights applicable to the forfeiture action. *See* 725 ILCS 150/6 (2009). In addition, the State's Attorney sends a letter advising the owner and other interest holders that Assistant State's Attorneys are available to discuss the matter. Such meetings frequently occur, and as a result, the State's Attorney either settles or rescinds the majority of the administrative forfeiture cases. If the action is rescinded, the property is returned to the owner.

"[a] defendant aggrieved by an unlawful search and seizure may move the court for the return of property." 725 ILCS 114-12(a) (2009).

Under these provisions, a property owner, whether he is a defendant in a criminal prosecution or the owner of property which was seized pursuant to a warrant, may petition the court for its return. In addition, sections 1, 2 and 5 of LEDPA authorize all other property owners or persons holding a property interest to file the same petition. Consequently, under Illinois law, any owner or other persons entitled to possession of personal property may claim and recover possession of such property at any time.

B. CAFRA Potentially Allows For A Longer Period Of Time To Elapse Prior To The Initiation Of A Civil Forfeiture Proceeding Than DAFPA Does.

DAFPA allows the seizing police agency up to 52 days to complete its investigation and notify the State's Attorney and then provides the State's Attorney an additional 45 days to either notify the owner or institute *in rem* forfeiture proceedings. *See* 725 ILCS 150/5 (2009); 725 ILCS 150/9 (2009). Unless continued for good cause, the civil forfeiture hearing must be convened within 60 days after the property owner files an answer to the complaint. 725 ILCS 150/9(F) (2009).

Under CAFRA, the federal government is required to send notice to property owners no more than 60 days after seizure if the seizing authority is the United States and 90 days after seizure if the seizing authority is State

or local government. 18 U.S.C. § 983(a)(1)(A)(i) and (iv). If the federal government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property, then a supervisory official in the headquarters office of the seizing agency may extend the period for sending notice by 30 days. 18 U.S.C. § 983(a)(1)(B). Significantly, upon a motion by the Government, a court may extend the period for sending notice by an additional 60 days, which period may be further extended by the court for 60-day periods, as necessary. 18 U.S.C. § 983(a)(1)(C).

The time schedules in DAFPA and CAFRA have sufficient length and flexibility to enable the seizing authority to conduct its investigation. Nothing in the history of civil forfeiture, including the decisions in *$8,850* and *Von Neumann*, support the notion that these time schedules facially violate the Due Process Clause. The Seventh Circuit's conclusion that DAFPA violates due process because it does not provide an interim, adversarial hearing within days after seizure is not legally tenable.

C. The Seventh Circuit's Decision Impairs The Rights Of The Community As It Needlessly Weakens The State's Ability To Utilize *In Rem* Civil Forfeiture Proceedings As A Law Enforcement Tool.

Not all *in rem* forfeitures are the result of the property owner's blameworthy conduct. *See Austin v. United States*, 509 U.S. 602, 629 (1993) (Kennedy, J., concurring in part and concurring in the judgment). This Court has long held that *in rem* forfeiture is predicated

on the theory "that the thing is primarily considered the offender." *Good*, 510 U.S. at 82 (Thomas, J., concurring in part and dissenting in part); *Harmony* v. *United States*, 43 U.S. (2 How.) 210, 237 (1844) (finding that a ship used for piracy was subject to forfeiture but the cargo on the ship was not). In other words, the relevant inquiry is whether the lawful property committed an offense. *See Austin*, 509 U.S. at 628 (Scalia, J., concurring in part and concurring in the judgment) (observing that "the relevant inquiry for an excessive forfeiture under 21 U.S.C. § 881 is the relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?")

While civil *in rem* forfeiture has long been understood as independent of criminal punishments, *United States v. Ursery*, 518 U.S. 267, 295 (1996) (Kennedy, J., concurring), the Illinois General Assembly found that:

> the civil forfeiture of property which is used or intended to be used in, is attributable to or facilitates the manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], the Cannabis Control Act [720 ILCS 550/1 et seq.], or the Methamphetamine Control and Community Protection Act [720 ILCS 646/1 et seq.] will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. . . The General Assembly further finds

> that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country.

725 ILCS 150/2 (2009). Not surprisingly, "instrumentality-forfeiture statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property." *Ursery*, 518 U.S. at 294 (Kennedy, J., concurring).

Criminal investigations generally proceed on a parallel track with *in rem* civil forfeitures. Requiring an interim, adversarial hearing by a fixed, arbitrary date without any consideration of whether the seizing authority's investigation has been completed not only jeopardizes the *in rem* proceeding but may lead to the release of potential evidence in a criminal action long before the criminal statute of limitations has run. Without providing any corresponding benefit not already available under Illinois law, the Seventh Circuit's call for an interim hearing needlessly weakens a long-used, historic tool of law enforcement.

It cannot be disputed that the police and State's Attorney have a significant interest in retaining the property while they complete their investigation into the ownership of the seized property because, unlike real estate, cars and cash are mobile and easily disposed of, and the police and prosecutors must ensure that the property is not needed as evidence in a criminal prosecution. Society, to be sure, has a strong interest in removing the instrumentalities of narcotics offenses from potentially being used again for such purposes.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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