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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

REPLY BRIEF

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ARGUMENT

In a civil forfeiture case, the process due is the forfeiture hearing itself. *United States v. Von Neumann*, 474 U.S. 242, 251 (1986) (holding that Von Neumann's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money [seized]"). The Due Process Clause does not require a separate proceeding, prior to the forfeiture hearing, to determine the reasonableness of the seizure. *Id* at 249-51; *United States v. $8,850,* 461 U.S. 555, 564-69 (1983). *See also Gelston v. Hoyt*, 16 U.S. (3 Wheat) 246, 312 (1818); *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1 (1817).[1]

Respondents disregard this authority and, moreover, play down the importance of the common law, statutory and constitutional protections that property owners have with regard to seized property. For example, in the time period post-seizure but prior to the State filing a civil forfeiture action, a property owner can seek judicial relief pursuant to the common law

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[1] In *$8,850*, this Court recognized that "[t]he *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *$8,850*, 461 U.S. at 564. In considering this third factor, this Court observed that "[a] claimant is able to trigger rapid filing of a forfeiture action if he desires it." That is true under the federal system and is true under Illinois law, as well. If a State did not allow a claimant "to trigger rapid filing of a forfeiture action," that would likely impact the weighing of the four *Barker* factors in determining whether the State's delay in initiating civil forfeiture proceedings violated due process.

(*i.e.*, filing a *Slocum* motion asking the Court to compel the State to file a civil forfeiture action or release the property) or by statute. *See, e.g.,* 765 ILCS 1030/5 (2009) (stating that "[t]he owner or other person entitled to possession of [property that is abandoned, lost or stolen or otherwise illegally possessed] may claim and recover possession of the property . . . upon providing reasonable and satisfactory proof of ownership or right to possession"). If the seized property is the subject of a criminal prosecution and no civil forfeiture proceeding has been filed, then the property owner may petition the criminal court pursuant to Section 108-11 of the Illinois Code of Criminal Procedure, 725 ILCS 5/108-11, for the return of the property. *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).

If a civil forfeiture proceeding has been filed, then the application of the *Barker* "speedy trial" test protects the due process rights of owners. *$8,850*, 461 U.S. at 569.[2] Once the State's Attorney files a civil forfeiture action under DAFPA, the property owner and other claimants may seek judicial relief pursuant to the Illinois Code of Civil Procedure to expedite and conclude the

[2] In *$8,850*, this Court noted that before the government filed its civil forfeiture action, the claimant failed to pursue informal remedies to secure the return of the property and, moreover, did not file a common law equitable action under *Slocum* or to file a motion under Federal Rule of Criminal Procedure 41. *$8,850,* 461 U.S. at 569. In applying the *Barker* test, this Court recognized 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*.

forfeiture hearing. *See, e.g.*, 735 ILCS 5/2-1005 (2009) (authorizing either party to file a motion for summary judgment); and 735 ILCS 5/2-1007.1(b) (2009) (stating that "the court may, in its discretion, grant a motion for preference in setting for trial where a party shows good cause that the interests of justice will be served by granting a preference in setting for trial.") In light of these protections both before and after the filing of civil forfeiture complaints, DAFPA does not facially violate the Due Process Clause.

Respondents contend that the Due Process Clause requires an interim hearing because Section 9(J) of DAFPA provides that "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 . . ." 725 ILCS 150/9(J) (2009). (Resp. Br. 19, 23 and 36.) Of course, prior to the initiation of a forfeiture proceeding, a property owner can also move to expedite the forfeiture proceeding pursuant to *Slocum* or Section 5 of LEDPA, 765 ILCS 1030/5 (2009). In ruling on these various motions, a court ultimately must decide whether to expedite forfeiture proceedings or stay them.

Respondents seemingly ask this Court to declare that DAFPA is unconstitutional in order to ensure that they receive an expedited, adversarial hearing in which they may establish their "innocent owner" defense. The Due Process Clause, however, does not guarantee a particular result in a particular case. It simply guarantees an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). All owners of seized property in Illinois have the

opportunity to petition a court to expedite civil forfeiture proceedings or seek the return of their property. Respondents argue that the Due Process Clause guarantees an expedited hearing. Neither case law from this Court nor the history of civil forfeiture supports this reading of the Due Process Clause.

I. Respondents' Proposed Interim Relief Places Substantial Burdens On The Judicial System But Is Designed To Benefit A Narrow Class Of Property Owners.

The structure of DAFPA provides practical benefits for both prospective claimants and the State. For example, the time schedules in DAFPA provide such claimants with an opportunity to negotiate settlements with the State. As *amicus* Women's Criminal Defense Bar Association ("WCDBA") has recognized, "the opportunity [for claimants] to be heard [and to negotiate with the State's Attorney] has produced significant results in terms of returned property." (WCDBA Br. 26.) If claimants can negotiate a settlement with the State, they need not incur the expense of hiring an attorney or the burden of going to trial. The time schedules in DAFPA also provide the police with an opportunity to complete their investigation and determine the identity of all persons with an interest in the seized property.[3]

[3] Respondents overstate the amount of delay in DAFPA as approximately six months. (Resp. Br. 2.) So does *amicus* ACLU. (ACLU Br. 1.) This position is without merit. The parties agree that for property under $20,000.00 in value, the statute gives the seizing authority 52 days to notify the SAO and the SAO has 45 days to notify owners and all known interest holders. At that point, the owners and interest holders have all the notice they need to pursue available statutory and common law remedies to secure the return of the property.

Under Sections 4 and 6 of DAFPA, the State's Attorney provides notice to the owner of the property and all known interest holders of the property. 725 ILCS 150/4 (2009); 725 ILCS 150/6 (2009). Without a complete investigation, the notice may not reach all interest holders, including some innocent owners.

The expedited adversarial hearing that Respondents request would undermine many of the benefits of the current statutory process. If the parties have to conduct what for all practical purposes is a trial on the merits within ten days, the parties simply will have no meaningful opportunity to negotiate, as inevitably their respective positions will harden the closer they get to trial. Claimants, if they have received notice, will need to hire a lawyer for this expedited hearing. Potential claimants who have not received notice may lose an opportunity to place a claim on the seized property. Expedited hearings would begin even though the police had barely begun their investigations. The government would have to bear the expense of furnishing courts or administrative bodies to adjudicate additional adversarial hearings.

The societal costs attendant with the relief that Respondents seek is high. In their brief, Respondents acknowledge that the interim, adversarial hearing they request may not have application for all property owners. Respondents state that "[p]erhaps only innocent, car owners (those who are not themselves charged with any criminal conduct) will be entitled to a hearing." (Resp. Br. 45.) While Respondents question the ability of the police to determine whether probable cause exists to seize property, Resp. Br. 16, Respondents

do not discuss the State establishing probable cause in an interim hearing. Respondents instead argue that innocent car owners[4] should have an interim hearing to establish: (1) likelihood of success on the merits, (2) that a "bond or other assurances are sufficient" to protect the State's interests and (3) that a balancing of hardships favors the release of the car. (Resp. Br. 3, 4, 46, 48.)[5] Respondents do not discuss how their proposed interim hearing would benefit the owners of other seized property, such as cash or guns.[6]

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[4] With regard to the "innocent owner" affirmative defense set forth in Section 8(A)91) of DAFPA, Respondents argue that Petitioner "implies that Respondents' case is governed by *Bennis v. Michigan*." (Resp. Br. 24.) Petitioner's position on *Bennis* is more correctly stated this way: if the Due Process Clause, as construed in *Bennis*, does not mandate that States provide an "innocent owner" defense, then DAFPA does not facially violate the Due Process Clause because it does not provide within ten days an adversarial hearing in which a claimant could advance an innocent owner defense.

[5] Respondents further argue that innocent owners are entitled to an immediate hearing to "prove the [seizing] officer's spontaneous judgments were mistaken." (Resp. Br. 27.) In support of this argument against any delay prior to such a hearing, Respondents ask what happens if a witness who would corroborate the submission of an "innocent owner" defense dies. (Resp. Br. 37.) Of course, this observation applies to any type of judicial proceeding, ranging from a hearing on a motion to suppress to a trial on the merits. Under Respondents' logic, all evidentiary hearings would need to be expedited.

[6] In this regard, *Krimstock* does not focus on cash or guns but rather on three concerns regarding civil forfeiture of automobiles: (1) delay, (2) the impact of forfeiture on innocent owners of automobiles and (3) the lack of available remedies

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Respondents, therefore, request an expedited, adversarial hearing ten days after seizure that the Constitution does not require but that needlessly burdens all claimants, the police, the State and the court system. Respondents ask for this relief purportedly to help innocent owners of automobiles seized pursuant to DAFPA. The common law, Illinois statutes and informal procedures under DAFPA already protect the rights of such property owners and provide them with an avenue to seek judicial relief for undue delay, regardless of whether the State has filed its forfeiture complaint. Respondents, it seems, would have this Court mandate an additional hearing that would burden all owners of forfeited personal property but would help only a narrow class of car owners who already have legal remedies at their disposal. To borrow a phrase from Justice Frankfurter, Respondents propose "to burn the house to roast the pig." *Butler v. Michigan,* 352 U.S. 380, 383 (1957). The Due Process Clause does not mandate such a result.[7]

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under the challenged New York ordinance. Gregory L. Acquaviva and Kevin M. McDonough, How To Win A *Krimstock* Hearing: Litigating Vehicle Retention Proceedings Before New York's Office of Administrative Trials and Hearings, 18 Widener L.J. 23, 39-41 (2008).

[7] WCDBA argues that other Illinois forfeiture statutes provide for preliminary hearings to determine probable cause. (WCDBA Br. 29, n. 17.) WCDBA, however fails to state that in these statutes, the finding of probably cause is a prerequisite to the State obtaining a restraining order, injunction, prohibition, lis pendens or other extraordinary relief in connection with the property subject to forfeiture. In this respect, the Illinois statutes that WCDBA cites are distinguishable from DAFPA and are inapposite to the appeal.

II. Respondents' "Improper Motive" Argument Lacks All Merit.

Throughout the history of civil forfeiture, the beneficiary of forfeited property was always the government. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). This does not invalidate civil forfeiture statutes or make them constitutionally suspect.

Nonetheless, Respondents and various *amici* argue that the desire for revenue is the driving force in civil forfeiture litigation. *See, e.g.,* Resp. Br. 7, 9, 14-16, 36-37 and 50; Nat'l Police Accountability Project ("NPAP") Br. 6-7 and 23; Inst. For Justice Br. 17-25 and 33-37; and Cato Br. 6, 11 and 32-35. In advancing this argument, Respondents and *amici* argue that law enforcement has improper motives with respect to the initiation of civil forfeiture proceedings. Nothing in the record remotely suggests that the Petitioner or the City of Chicago defendants below had any such motives.[8]

[8] *Amicus* Cato Institute, Goldwater Institute Scharf-Norton Center for Constitutional litigation and Reason Foundation (collectively "Cato") cites a newspaper article discussing a scandal in Tenaja, Texas in which local police were accused of stopping black motorists due to their race and seizing their cars. (Cato Br. 24-25.) Petitioner shares Cato's indignation at such an unjustified abuse of power. This story, however, is not germane to this appeal for two reasons. First, the alleged discriminatory practices of a local government in Texas are simply not relevant to the issue of whether DAFPA is facially unconstitutional. Second, the remedy for the conduct alleged to have occurred in Texas is a *Monell* claim alleging invidious discrimination and violations of the Equal Protection Clause. Respondents here have not alleged that DAFPA discriminates on the basis of race, gender, national origin or on any other basis.

In this regard, Respondents invoke the Latin phrase "*Nemo iudex in sua causa*," Resp. Br. 6, and accuse Petitioner of attempting to be "the judge in her own cause." This maxim has no application here, as the State's Attorney has never contended that she should be the final arbiter regarding the disposition of seized property. It is, instead, the judicial branch that ultimately must decide whether to stay a forfeiture proceeding for good cause, whether to compel the State to initiate forfeiture proceedings or release the property and whether to sustain a claimant's "innocent owner" defense.

Furthermore, when a local government seizes property, such as cash, pursuant to DAFPA, that cash is placed in a bank account. The existence or non-existence of an interim hearing within ten days of seizure of such cash is completely unrelated to the distribution of seized cash to various governmental bodies in the event that the State prevails in the forfeiture hearing. Respondents simply do not explain why an interim hearing would combat the alleged improper motives of seizing authorities and law enforcement in civil forfeiture cases. Without expressly saying so, Respondents seemingly call for an additional layer of process to civil forfeiture litigation to disable the government's ability to prosecute forfeiture complaints. If the seizing authority is not given time to conduct a proper investigation, the State's ability to prosecute any case, including forfeiture cases, is undermined.

III. DAFPA Does Not Preempt Common Law and Other Statutory Remedies of Property Owners.

Respondents acknowledge that property owners have a common law right to seek judicial relief regarding a delay in the initiation of civil forfeiture hearings (*i.e.*, the owner may ask the court to compel the State to initiate a civil forfeiture hearing or release the property). Respondents inaccurately characterize this equitable remedy (discussed in *Slocum* and *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855)) as a motion for "interim" relief. (Resp. Br. 27-30.) Such relief is not interim (*i.e.*, temporary or short-term) in the way that a *Gerstein* hearing is. *See Gerstein v. Pugh*, 420 U.S. 103 (1975). To the contrary, *Slocum* recognizes that property owners have a common law right to ask the court to compel the State to start the forfeiture proceeding or release the property.

A. DAFPA Does Not Preempt The Common Law Right To Seek Judicial Redress Recognized in *Slocum*.

Respondents argue that Section 9(J) preempts the common law property right to equitable relief recognized in *Slocum*.[9] 725 ILCS 150/9(J) (2009). It does not.

[9] Petitioner's position regarding the equitable relief recognized in *Slocum* was not taken at the proverbial "eleventh hour" in this litigation, as Respondents contend. (Resp. Br. 41.) Respondents filed an "as applied" challenge to DAFPA. (Joint App. 32a, 33a and 38a.) In the district court, Petitioner moved for dismissal based upon *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994). (Joint App. 67a, 71a and 72a.) The district court dismissed

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Moreover, Respondents' proposed reading of Section 9(J) has no basis in the plain language of the statute and is contrary to the applicable rule of statutory construction in Illinois: statutes in derogation of the common law must be strictly construed. *Summers v. Summers*, 40 Ill. 2d 338, 239 N.E.2d 795 (1968).

Section 9(J) states, in part, that property subject to forfeiture "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." 725 ILCS 150/9(J) (2009). This provision concerns the administration of seized property where the property is subject to hearings in multiple courts (*i.e.*, a court hearing a criminal prosecution and a court hearing the civil forfeiture case). In contrast, *Slocum* recognizes the right of a property owner to ask a court to compel the State to either proceed with a civil forfeiture proceeding or release the property. *Slocum*, therefore, addresses

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Respondents' complaint. (Pet. App. 12a.) On appeal, Petitioner argued that *Jones* was correctly decided and that the district court should be affirmed. The Seventh Circuit ruled that DAFPA facially violated the Due Process Clause. (Pet. App. 8a.) Petitioner has subsequently argued to this Court that unlike the opinion below and *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), *Jones* properly followed *$8,850* and *Von Neumann*. In advancing this argument, Petitioner has relied upon the common law history of civil forfeiture and precedent from this Court, such as *Slocum* and *Gelston*, recognizing the common law right of property owners to seek equitable relief to compel a forfeiture hearing or a release of the seized property. Petitioner was not dilatory in presenting such authority.

the issue of when the civil forfeiture case will proceed, if at all. Section 9(J) does not.

Consequently, Section 9(J) and *Slocum* do not conflict, as they address wholly separate issues. In fact, nothing in DAFPA limits or extinguishes the equitable relief recognized in *Slocum*. In Illinois, "statutes in derogation of common law are to be strictly construed and nothing is to be read into such statutes by intendment or implication." *Summers*, 40 Ill. 2d at 342, 239 N.E.2d at 798. Under Illinois law, a statute in derogation of the common law cannot be construed as changing the common law beyond what the statutory language expresses or is necessarily implied from what is expressed. *Williams v. Manchester*, 228 Ill. 2d 404, 419, 888 N.E.2d 1, 10 (2004).

Here, DAFPA does not modify or otherwise conflict with the common law right recognized in *Slocum*. In fact, the Illinois General Assembly enacted LEDPA, which authorizes a property owner, where property was seized but no forfeiture action is pending, to claim and recover possession of property that the government possesses. *See* 765 ILCS 1030/5 (2009).

Neither DAFPA nor any other Illinois statute preempts *Slocum*.

B. Respondents Do Not Recognize The Full Scope Of LEDPA.

Respondents incorrectly argue that LEDPA applies only to property that has been lost or abandoned. (Resp. Br. 41.) This statute also applies to property that is

"stolen or **otherwise illegally possessed**." 765 ILCS 1030/1 (2009) and 765 ILCS 1030/2 (2009) (emphasis added). An allegation that a person illegally possesses property is at the heart of the "innocent owner" affirmative defense.

Respondents also argue that *People v. Moore*, 410 Ill. 241, 102 N.E.2d 146 (1951) and *People v. Kapande*, 23 Ill. 2d 230, 177 N.E.2d 825 (1961) are inapposite because they pre-date DAFPA, Resp. Br. 42-43, but that argument misses the mark. *Moore* and *Kapande* merely show that the common law right to demand the return of seized property is recognized in Illinois.

IV. Respondents' Position Cannot Be Reconciled With *Slocum*.

A. *Slocum* Compels Reversal Of Decision Below.

Respondents admit that at common law, property owners have the right to ask the State to initiate civil forfeiture proceedings or release the property. (Resp. Br. 27-30.) Like the cargo owner in *Slocum*, Respondents sought judicial relief regarding an undue delay in the resolution of a civil forfeiture proceeding in the wrong court. In *Slocum*, the federal courts had exclusive jurisdiction over the civil forfeiture action but the cargo owner sought judicial relief (a *replevin* action) regarding the delay in initiating civil forfeiture proceedings in a Rhode Island state court. *See Slocum*, 15 U.S. at 14 ("[t]he common law courts of the United States have no jurisdiction in the case. They can afford him no relief.")

The present case presents the exact opposite jurisdictional scenario from *Slocum*: Illinois had exclusive *in rem* jurisdiction over the subject property but the respondents sought judicial relief in federal court. Under *Slocum*, Respondents should have sought judicial relief in the Illinois courts if they wanted to ask a court to compel the State to initiate civil forfeiture proceedings or return the property.

B. Illinois Law Provides Property Owners And Prospective Claimants With A Mechanism For Expediting The Judicial Process In Civil Forfeiture Cases.

$8,850 and *Von Neumann* show that the process due here is the civil forfeiture hearing itself. Respondents' argument to the contrary, Resp. Br. 29, cannot be reconciled with this line of cases. In addition, Respondents argue that "[n]either *$8,850* nor *Von Neumann* addressed the use of interim remedies" and that Respondents "never requested dismissal of the forfeiture charges or any other relief that would affect the speedy disposition of the forfeiture proceedings." (Resp. Br. 32, 33, 39; *see also* ACLU Br. 13.) This is not a fair reading of *$8,850*, *Von Neumann* or *Slocum*.

Under *Slocum* and *Gelston*, a property owner seeking equitable relief to compel the initiation of a civil forfeiture hearing does not strictly request dismissal. The owner instead asks the court to compel the State to go forward with the civil forfeiture action or, alternatively, to return the property. In this regard, Respondents' position is somewhat disingenuous. Respondents say that they do not seek dismissal but

they ignore the obvious: if the State cannot establish probable cause or if an owner can establish the innocent owner defense at the interim hearing that Respondents seek, then the forfeiture action is over and the property is returned.

Without saying so, Respondents essentially ask this Court to overrule *$8,850* and *Von Neumann*. (Resp. Br. 34-37.) In this regard, Respondents argue that application of the *Barker* speedy trial test does not adequately protect their due process rights because Section 9(J) allows "good cause continuances while the criminal case is pending." (Resp. Br. 36). Section 9(J) certainly allows the State's Attorney to move for a stay. But *Slocum* authorizes owners or other persons with an interest in the property to compel a forfeiture proceeding or release the property. LEDPA authorizes a property owner to move for the return of wrongfully seized property. With regard to any such motions, a court ultimately would have to decide what to do.

Respondents further contend that they are powerless to compel a prosecutor to perform discretionary acts and, as a result, the *Slocum* common law equitable remedy provides no actual relief. (Resp. Br. 43.) Respondents' analysis rests on a faulty understanding of *Slocum*. Indeed, the common law equitable remedy from *Slocum* is not to compel a prosecutor to take a particular action, but instead to inform the State that it had to choose whether to prosecute the forfeiture or release the property. In this sense, the equitable remedy from *Slocum* is analogous to the statutory speedy trial guarantee in Illinois.

See, e.g., 725 ILCS 5/103-5 (2009) (mandating that the State choose whether to try an individual within 120 days from the date he was taken into custody or, alternatively, release him).

Respondents challenge Petitioner's reliance on *Slocum* and contend that Petitioner has "misidentifie[d] the relevant common law and early colonial practices," thus rendering her argument that the forfeiture hearing itself is all that is required by the due process clause "unquestionably false." (Resp. Br. 27, 29.) To support their claim that the historical practices provided the right to "immediate judicial review" following a seizure by the government for forfeiture purposes as well as the opportunity to post bail for the property, Respondents cite *Slocum* and *Murray's Lessee*. Neither decision stands for the proposition offered by Respondents.

First, as explained above, *Slocum* made clear that while a claimant to the property has the right to avoid an unreasonable delay by asking the court to either compel a prosecutor to institute the forfeiture proceedings or to release the property, the claimant may not attempt to litigate the validity of the seizure in a separate proceeding or before a separate tribunal. 15 U.S. at 10. As the Court explained, "it depends upon the final decree of [the forfeiture court] whether such seizure is to be deemed rightful or tortious." *Ibid.* See also *Gelston*, 16 U.S. at 312 ("The decree of the [forfeiture] court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture.")

Similarly, although *Murray's Lessee* addressed the constitutionality of a statute authorizing the Treasury Department to issue distress warrants which empowered a United States Marshal to seize the real and personal property of a customs collector who had been delinquent in turning over the funds to the federal government, and to sell that property in satisfaction of the debt, it did not in any way declare that due process requires the opportunity to post "security" in order to retrieve property seized by the government. (Resp. Br. 28.) Rather, in holding that the statute comported with the Due Process Clause of the Fifth Amendment, the Court noted that "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown" (59 U.S. at 277), and the fact that Congress had provided for judicial oversight and bail was a legislative choice which was not required by the constitution. *Id.* at 285.

Thus, contrary to Respondents' claims, the historical record supports Petitioner's arguments that the Due Process Clause does not require an adversarial "postseizure/preforfeiture" hearing to test the validity of the seizure and provide for release on bond of the seized property. Of course, some states specifically provide for such a hearing by statute. See Arizona Rev. Stat. § 13-4310; Fla. Stat. 932.703(2)(a). But other states, like Illinois, and the Federal Government have chosen less formal solutions for addressing concerns over unreasonable delay in conducting the forfeiture proceedings. (*See* National Ass'n of Counties Br. 22.) "To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered

legislative response . . . [because] 'judicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures'." *District Attorney's Office v. Osborne*, __ U.S. __, 129 S. Ct. 2308, 2322 (2009) (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment)).

V. Respondents' Argument Regarding "Passing On" Notice To Innocent Owners Is Legally Untenable.

Respondents argue that "[r]easonable notice must be given but also note that in most cases notice to the driver is sufficient, given that the driver either owns the car or knows who that owner is, and can pass that notice on." (Resp. Br. 52.) This argument is legally groundless. It is the height of irony for Respondents to suggest that the government could simply rely on the driver of a seized vehicle to pass notice on to the owner of the car. Respondents do not explain how such a procedure satisfies due process. The driver is not the agent of the State and, thus, the State could not simply assume that the driver would pass on such notice. Moreover, Respondents cannot seriously expect the driver of a seized automobile to pass on notice to all persons with a property interest in the car, such as a car finance company. The State's Attorney has to notify the owner and all known persons with an interest in the property. Without a proper investigation, the State's Attorney cannot give notice to all persons with a property interest in the seized property.

Respondents concede the risks associated with insufficient notice, particularly with property other than

automobiles. (Resp. Br. 53.) Respondents also concede that some risk exists with the concept of bonding out forfeited property. (Resp. Br. 53-54.) Respondents, however, argue that the same risk exists when a person charged with a crime posts bail. There are two problems with this argument. First, persons charged with crimes have a constitutional right to ask for a bail bond. *See* U.S. Const., Eighth Amendment. Second, no such right exists for property and, in any event, personal liberty is not the equivalent of personal property.

If innocent owners do not get notice of the forfeiture of their property, they cannot meaningfully assert their property rights. *Mullane*, 339 U.S. at 314 (the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest"). Respondents cite *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) for the proposition that "due process demands a hearing 'at a meaningful time and in a meaningful manner.'" (Resp. Br. 15.) Respondents' citation to *Armstrong* is ironic because the interim hearing they propose undermines the State's ability to provide adequate notice to innocent owners. The concept of having an interim hearing that essentially duplicates the forfeiture hearing itself — when the police have barely begun their investigation — leaves innocent owners in a precarious position. If such innocent owners have not received notice, they cannot participate in Respondents' proposed "interim" hearing and, thus, could be denied the opportunity to participate "at a meaningful time and in a meaningful manner." *Armstrong*, 380 U.S. at 552.

VI. The Due Process Clause Does Not Mandate That DAFPA Provide An Interim, Administrative Adversarial Hearing.

DAFPA balances the rights of government with those of claimants of seized property, including those claiming to be innocent property owners. The fact that DAFPA does not provide an interim hearing that duplicates the civil forfeiture hearing does not violate the Due Process Clause.

A. The "Interim" Relief That Respondents Request Is Interim In Name Only.

Respondents argue that the interim hearing that the Seventh Circuit contemplated is not an adversarial one. (Resp. Br. 45.) It is. In this regard, the Seventh Circuit substituted its judgment for the judgment of the Illinois General Assembly with regard to the time necessary to conduct the civil forfeiture hearing itself. The Seventh Circuit's view was not, as respondents argue, "a cautious and incremental step." (Resp. Br. 12.)

Amicus ACLU argues that the preliminary hearing that the Seventh Circuit outlined does not replicate the civil forfeiture hearing itself because the court stated that this hearing "need not be formal" and did not set a "specific time frame" for the hearing. (ACLU Br. 9.) However, Respondents asked in their complaint that this preliminary hearing be held within ten days of seizure. (Joint App. 36a.) Moreover, the Seventh Circuit stated that "[a]ll in all, we agree with *Krimstock*." (Pet. App. 8a.) The Seventh Circuit also cited with approval interim, adversarial forfeiture hearings that are statutorily provided in Florida and Arizona. (Pet. App. 9a.)

It certainly appears the Seventh Circuit contemplated the imposition of *Krimstock*-style hearings that replicate those conducted in New York City. *Krimstock* hearings are, for all practical purposes, the equivalent of a trial on the merits.[10] *Amicus* Cato "wonder[ed] why [Petitioner does] not discuss the actual workings of the *Krimstock* hearing in New York City since that would presumably provide the best evidence that such hearings are burdensome to law enforcement." (Cato Br. 16.) In fact, the procedures used in *Krimstock* hearings, as set forth in OATH's website[11] show that interim *Krimstock* hearings are adversarial proceedings that duplicate the civil forfeiture hearing itself.

The interim *Krimstock* hearings in New York have all the characteristics of an adversarial hearing on the merits under Section 9 of DAFPA. *See generally* Acquaviva, 18 Widener L.J. 23 (2008). In *Krimstock* hearings, the New York Police Department has the duty to provide such notice on two occasions: (1) in person, at the time the vehicle is seized and (2) by mail to the registered or titled owner within five business days of the seizure. Acquaviva, 18 Widener L.J. at 46. If the property owner alleges inadequate notice, the burden shifts to the department to prove its compliance with the notice requirements. *Id.*

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[10] *See* the flowchart for *Krimstock* hearings that New York's Office of Administrative Trials and Hearings ("OATH") has placed on its website. *See* http://www.nyc.gov/html/oath/pdf/Eng_Pamphlet.pdf and the attached appendix.

[11] *See* http://www.nyc.gov/html/oath/html/forfeiture.html (last visited on August 28, 2009).

Once a property owner has requested a hearing,[12] the police department must respond in two business days and hold an interim *Krimstock* hearing within ten business days. *Id.* at 52. Those time limits are strictly enforced and OATH and in *Police Department v. Manning,*[13] OATH rejected the Police Department's argument that settlement negotiations tolled the ten business day period. Acquaviva, 18 Widener L.J. at 52.

OATH's website candidly acknowledges that a *Krimstock* hearing is similar to a trial:

> The hearing at OATH is similar to a court trial. You can have a lawyer or non-lawyer representative. Both sides can make opening statements, present evidence, call witnesses to testify, and make closing statements.

See http://www.nyc.gov/html/oath/html/forfeiture.html. OATH sets forth the following items on which the government bears the burden of proof: (1) probable cause, (2) the government is likely to prevail on the merits, (3) no heightened risk to the public and (4) if the owner raises the "innocent owner" defense, the State must prove, by a preponderance of evidence, that

[12] The right to request a *Krimstock* hearing serves the same goal as procedures that already exist in Illinois law: the property owner's right to ask the Court to compel the State to initiate a civil forfeiture proceeding or, where a forfeiture case is already pending, the right to ask the Court to expedite the forfeiture hearing itself.

[13] *Police Dep't v. Manning*, OATH Index No. 1162/05 (OATH Jan. 25, 2005).

the vehicle's owner is not entitled to relief. *Id*. To meet its burden where the claimant raises the innocent owner defense, the police "must prove that the claimant 'permitted or suffered' the illegal use of the vehicle. The 'permitted or suffered' standard is fulfilled where the alleged innocent owner 'knew or should have known that the car would be used as the instrumentality of or in furtherance of a crime.'" Acquaviva, 18 Widener L.J. at 71. The observation of *amicus* Legal Aid Society that "[s]ome vehicle claimants have prevailed by presenting credible testimony that rebuts the assertions in police documents" demonstrates the adversarial nature of *Krimstock* hearings. (Legal Aid Soc. Br. 21.)

At the conclusion of the *Krimstock* hearing, the OATH judge will issue a decision within three business days. The losing party may then appeal the OATH judge's decision to the trial court.[14] The *Krimstock* hearing does not resemble a true interim hearing, such as a *Gerstein* hearing under the Fourth Amendment, but rather an administrative hearing[15] on the merits that can be appealed through the state court system. These administrative hearings can only be described as adversarial. Respondents' position to the contrary strains all credibility.

Amicus ACLU concedes that "[i]f the preliminary hearing[s] in the present case were merely an attempt to speed up the forfeiture hearing, one could more

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[14] *See* http://www.nyc.gov/html/oath/html/forfeiture.html.

[15] *Amicus* Legal Aid Society acknowledges that *Krimstock* hearings have "been institutionalized for more than five years at a city administrative tribunal." (Legal Aid. Soc. Br. 1.)

readily appreciate the argument that *$8,850* should guide the Court's decision here." (ACLU Br. 14.) The preliminary hearing that Respondents propose is exactly that and *$8,850* should be controlling.

B. *Gerstein* Is Not Analogous To The Present Case.

Respondents argue that the Fourth Amendment requires a "prompt, post-seizure hearing." (Resp. Br. 21.) *Amici* WCDBA and NPAP argue that a *Gerstein* hearing under the Fourth Amendment is analogous to the hearing that Respondents seek in this case. (*Amici* WCDBA Br. 7-13, 16-17; NPAP Br. 31-35.) It is not.

As an initial matter, Section 9(G) of DAFPA requires that the State establish probable cause.[16] This satisfies the Fourth Amendment. Respondents' true complaint in this case is delay in being able to advance an innocent owner defense. The potential for undue delay is an issue that raises concerns under the Due Process Clause. *See $8,850*, 461 U.S. at 562-563 (determining "when a post-seizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time" in violation of the Due Process Clause). A *Gerstein* hearing simply does not solve the delay problem that Respondents have raised.

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[16] *Amicus* Cato criticizes the fact that Section 9(G) allows the State to introduce hearsay evidence into evidence when establishing probable cause. (Cato Br. 31.) This criticism, however, is beyond the scope of the question presented in this appeal.

Furthermore, *Gerstein* hearings are not adversarial. Respondents, however, seek an adversarial hearing where the State has to establish probable case and where a property owner may assert an affirmative defense (*i.e.,* submit proof that he or she is an innocent owner). The comparison to *Gerstein* is not apt. *Amicus* WCDBA argues that if the Fourth Amendment requires a *Gerstein* hearing prior to extended detention of a person after an arrest, the Fourth Amendment also requires an, interim probable cause hearing immediately after the seizure of personal property. (WCDBA Br. 12-13.) This analogy fails, as *Gerstein* does not address the concerns about delay attendant with the seizure of property. Those concerns raise issues under the Due Process Clause, not the Fourth Amendment. This Court has recognized that:

> *Gerstein* and *Graham v. Connor*, 490 U.S. 386 (1989) concerned not the seizure of property but the arrest or detention of criminal suspects, subjects we have considered to be governed by the provisions of the Fourth Amendment without reference to other constitutional guarantees. In addition, also unlike the seizure presented by this case, the arrest or detention of a suspect occurs as part of the regular criminal process, where other safeguards ordinarily ensure compliance with due process . . . Neither *Gerstein* nor *Graham*, however, provides support for the proposition that the Fourth Amendment is the beginning and end of the constitutional inquiry whenever a seizure occurs.

United States v. James Daniel Good Real Property, 510 U.S. 43, 50 (1993).

Respondents have requested an order mandating an interim hearing similar to the *Krimstock* hearings. *Krimstock* hearings are adversarial hearings with opening statements, the introduction of evidence, cross-examination, closing arguments and administrative review. *Krimstock* hearings could hardly be more dissimilar to *Gerstein* hearings. It would be completely incongruous to hold that the detention of a person mandates a non-adversarial, *Gerstein* hearing but the detention of personal property mandates what amounts to an immediate trial.

C. Respondents' Garnishment Cases Do Not Mandate The Imposition Of An Immediate, Adversarial Hearing In Civil Forfeiture Cases.

A garnishment statute provides a judgment creditor with a means of obtaining the property of a judgment debtor from a third-party in order to satisfy a debt or judgment. *See, e.g., Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383 (2003) (recognizing that garnishment is a "judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor's property"). The role of a bailee in a garnishment case is wholly distinguishable from the role of the State in a civil forfeiture proceeding. As a result, Respondents' reliance on *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975), Resp. Br. 19-20 and 39, is misplaced.

In *North Georgia*, a bank account "was impounded and, absent a bond, put totally beyond use during the

pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer." *North Georgia*, 419 U.S. at 606.

North Georgia is not analogous to the present case. Unlike the bank in *North Georgia* (which did not have a property interest in the bank account or the alleged debt), the State has an interest in seized property. Property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Under Illinois law, title to forfeited property vests with the State upon commission of the illegal act. *See* 725 ILCS 150/9(K) (2009); *accord United States v. Stowell,* 133 U.S. 1 (1890). Such property remains forfeited unless a claimant can establish an exemption under Section 8 of DAFPA. 725 ILCS 150/8 (2009). In other words, the seizure of forfeited property essentially places a cloud on the title of that property and a claimant may only remove this cloud by establishing an exemption. Significantly, the State's property right is rooted in the enforcement of its criminal laws: the State wants to stop the use of property (*i.e.,* money, guns, yachts, cars, *etc.*) in the commission of drug offenses. The State's interest in seized property is not, as *amicus* Institute for Justice argues,[17] minimal.

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[17] Inst. For Just. Br. 37-38.

Furthermore, DAFPA preserves the *status quo* regarding the transfer or dissipation of seized property. The court in *North Georgia* did not preserve the *status quo*; it changed it by putting the property totally beyond use.

In sum, the State's rights in a garnishment case are simply not the same as the State's rights in a civil forfeiture case. *North Georgia* does not concern civil forfeiture and is inapposite. Respondents' argument that *Barker* is not reconcilable with *North Georgia*, Resp. Br. 38, is without merit.

VII. Under Either The *Barker* "Speedy Trial" Test Or *Mathews*, DAFPA Does Not Violate The Due Process Clause.

Respondents contend that Petitioner has "sidestepped" the Government's "concession" that *Mathews v. Eldridge*, 424 U.S. 319 (1976), rather than *Barker*, applies to the question of determining when a postseizure hearing must be held. (Resp. Br. 27.) Such an assertion is blatantly wrong where the United States made no such concession (*see* United States Br. 8) ("This Court has considered that question in a number of cases, including *$8,850*. But even if the same question were considered afresh under *[Mathews],* the outcome would be no different."), and where Petitioner specifically argued in her brief that "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." (Pet. Br. 45)

Moreover, although the "flexible" *Barker* test is preferable since it is applied on an "ad hoc basis" and therefore compels analysis of the particular circumstances of each case to determine if a person's rights have been unduly prejudiced (see *Vermont v. Brillon*, __ U.S. __, 129 S. Ct. 1283, 1290-91 (2009) (quoting *Barker*, 407 U.S. at 530))[18], the "categorical" *Mathews* rule (Resp. Br. 39) does not require a contrary conclusion as an application of the three *Mathews* factors demonstrates that DAFPA is constitutional even though it does not expressly provide for interim relief.

First, as stated in Petitioner's opening brief, the "private interest" at issue in this case is 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." (Pet. Br. 45) However, as this Court recognized in *City of Los Angeles v. David*, 538 U.S. 715, 717-18 (2003) (*per curiam*), the loss of the use of money for a period

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[18] *Amicus* ACLU criticizes the ad hoc approach of *Barker* precisely because it is flexible and requires a case-by-case analysis. (ACLU Br. 17-20.) Respondents advance the same criticism. *See* Resp. Br. 40 (characterizing the case-by-case approach that *Barker* offers as "wishy-washy"). *Amicus* WCDBA criticizes *Barker* as being too "binary" and too focused upon delay. (WCDBA Br. 32.) These criticisms are misguided, however, as "due process is flexible," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), and the *Barker* test considers length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *$8,850,* 461 U.S. at 564. The flexible approach of *Barker* properly focuses upon the facts and circumstances of each case to determine whether a particular claimant or owner has been unduly prejudiced.

of time is not as significant of a loss as the temporary deprivation of a job or the use of an automobile. Similarly, in *Von Neumann*, this Court specifically rejected the argument that the temporary loss of the use of an automobile while forfeiture hearings are being contemplated constitutes a "special hardship." *Von Neumann*, 474 U.S. at 249-51. Thus, just because a temporary deprivation of an automobile works a more serious harm than the loss of the use of money, it does not mean that the private interest in this case so overwhelms the government's interest. This is even more compelling in the forfeiture context, where the government has a protectable interest in the property itself, *see* 725 ILCS 150/9(K) (2009), and is not simply holding the property until a particular fee or fine is paid.

Similarly, the second factor, "the risk of an erroneous deprivation of such interest through the procedures used" (*Mathews*, 424 U.S. at 335), does not support Respondents' arguments. As argued above, the interim hearing anticipated by Respondents would be nothing more than a highly expedited version of the statutory forfeiture hearing. However, nowhere in Respondents' brief do they assert that the forfeiture hearing itself is an insufficient mechanism for protecting against erroneous seizure. Nor could they, as it is the prosecution's burden at that hearing to establish probable cause for the seizure, just as it would be at the proposed interim hearing.

Finally, as to the third factor, the government's interest falls squarely against Respondent's arguments. As *Mathews* itself recognized, this factor necessarily includes not only the "function involved," but also

"the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Respondents claim that such interim proceedings are "feasible" (Resp. Br. 54), but completely ignore the fact that "the administrative resources available to modern police departments are not limitless." *City of Los Angeles*, 538 U.S. at 718. As this Court acknowledged, it "takes time to organize hearings: there are only so many courtrooms and presiding officials" and "the city may have to find a substitute to cover [the seizing] officer's responsibilities while he attends the hearing." *Ibid.*

Similarly, this Court has long recognized that a prosecutor has a legitimate interest in delaying a prosecution until she is satisfied that the investigation is complete, even if it could prejudice the defendant's right to defend himself. See *United States v. Lovasco*, 431 U.S. 783, 790 (1977) ("[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment."). As the Court explained:

> From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove

> to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts. *Thus, no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so.*

Id. at 792 (emphasis added) (footnotes omitted).

Similarly, the Court noted that expediting the process could actually harm the suspect's interests because "requiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the Government from giving full consideration *to the desirability of not prosecuting in particular cases*." *Id.* at 794 (emphasis added). Accordingly, the Court concluded that:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," *United States v. Marion*, 404 U.S. at 324, precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of

> "orderly expedition" to that of "mere speed," *Smith v. United States*, 360 U.S. 1, 10 (1959). This the Due Process Clause does not require.

Id. at 795-96.

Thus, because Petitioner has a significant interest in completing the investigation *before* she litigates the propriety of the initial seizure and potential for forfeiture, as well as a compelling interest in protecting the property from destruction or disappearance while that investigation continues (*see Good*, 510 U.S. at 57), the government's interest outweighs Respondents' interest in the property while that investigation is conducted.[19]

VIII. Respondents Could Have But Did Not Exercise Available Remedies That Could Have Expedited Their Civil Forfeiture Cases.

Respondents argue that the "interim remedies Petitioner belatedly cites were not available to Respondents." (Resp. Br. 44.) That is simply not true with respect to the right of claimants to contact the State's Attorney, *see* Section 6(C) of DAFPA, or with respect to available common law or statutory remedies. *See, e.g., West Covina v. Perkins,* 525 U.S. 234 (1999)

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[19] *Amicus* Cato argues that "the DAFPA provision at issue in this case is explicitly limited to vehicles and to other personal property worth less than $20,000." (Cato Br. 21.) This argument ignores the fact that the Seventh Circuit held that DAFPA was facially unconstitutional. (Pet. App. 8a.) Thus, the procedures in DAFPA are at issue in this appeal, regardless of the value of the seized property.

(holding that the Constitution does not require local government to provide legal advice about how to use, or the consequences of using, particular remedies). *West Covina* held that with respect to property seized for a police investigation or criminal prosecution, no "rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by published, generally available state statutes and case law." *West Covina*, 525 U.S. at 241.

CONCLUSION

The court of appeals' decision should be reversed.

Respectfully submitted,

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