IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2017-CP-26-07411

(Appellate Case No. 2020-000092)

Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,
on Behalf of the 15th Judicial Circuit Drug Enforcement Unit ..... Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars
($20,771.00), U.S. Currency and Travis Green ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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**Motions for admission pro hac vice pending*

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STATEMENT OF ISSUES ON APPEAL

1. Whether S.C. Code Ann. § 44-53-530, which requires that the first $1,000 of all cash forfeited be remitted to the seizing agency and requires that 95% of all other forfeiture proceeds be remitted to the agencies responsible for the seizure and forfeiture, violates the 14th Amendment to the U.S. Constitution and Article I, Section 3 of the S.C. Constitution?

2. Whether South Carolina's requirement that property owners affirmatively prove "by a preponderance of the evidence that the property was innocently owned," absent any preliminary showing by the government of the owner's personal culpability, violates the 14th Amendment to the U.S. Constitution and Article I, Section 3 of the S.C. Constitution?

3. Whether the failure of South Carolina law to provide prompt, post-seizure hearings—hearings at which owners can challenge the basis of any seizure and the continued detention of their property for the duration of the forfeiture proceeding—violates the 14th Amendment to the U.S. Constitution and Article I, Section 3 of the S.C. Constitution?

4. Whether S.C. Code Ann. §§ 44-53-520 and -530, by permitting forfeiture of property absent any showing of culpability on the part of its owner, facially violate the 8th Amendment of the U.S. Constitution and Article I, Section 15 of the S.C. Constitution?

ARGUMENT

The court below correctly held that South Carolina's forfeiture statutes are facially unconstitutional. Those statutes' plain text shows why. Section 44-53-530 states that police and prosecutors get 95% of whatever property they seize and forfeit. That same section, along with Section 44-53-586, requires owners to prove their own innocence—even when the government has put forward nothing to show those owners' personal culpability—or lose their property forever. And neither Section 44-53-520, nor any other provision in South Carolina law, mandates that owners be given prompt post-seizure hearings at which those owners can contest the seizure of their property or ask that it be returned during the pendency of the forfeiture proceeding.

Appellant claims the trial court had insufficient facts in the record to reach its holding. But the statutes tell us everything that we need to know, and they show why this Court should affirm. In Part I, Respondents detail the financial incentive spelled out in Section 44-53-530 and how it violates due process[1] by creating a serious risk that officials' enforcement decisions will be distorted by the prospect of institutional gain. In Part II, Respondents show why the burden shifting scheme laid out in Sections 44-53-530 and 44-53-586 violates binding U.S. Supreme Court precedent by forcing people in civil proceedings to prove their own innocence. In Part III, Respondents explain why, as numerous courts across the nation have held, due process requires the government to provide owners of seized property a prompt and meaningful opportunity to seek that property's immediate return. And in Part IV, Respondents demonstrate why the plain text of South Carolina law, which expressly authorizes forfeiture absent any evidence that the property's owner did anything wrong, facially violates the excessive fines protections of the Eighth Amendment and Article I, Section 15.

I. The Trial Court Correctly Held That The Financial Incentive Created By South Carolina's Forfeiture Statute—Which Requires At Least 95% Of Forfeiture Proceeds Go To Seizing Police And Prosecutors—Violates Due Process.

Due process demands that government officials be committed to serving the public interest, not their own. But South Carolina law requires that the lion's share of forfeiture proceeds be committed to the very entities responsible for the seizing and forfeiting. The first $1,000 "of any cash seized and forfeited pursuant to this article" goes to the police agency that effectuated the seizure. S.C. Code Ann. § 44-53-530(f). And the seizing agency must receive

[1] Because South Carolina's forfeiture statutes are unconstitutional under both the U.S. and South Carolina Constitutions, Respondents do not distinguish between the two in their brief.

75% of all other cash, securities, and other real or personal property it seized that have been forfeited and "reduced to proceeds." The prosecuting agency that effectuated the forfeiture is entitled to 20%. S.C. Code Ann. § 44-53-530(e). Thus, the text of the statute directs that at least 95% of the value of all forfeited property go to the very government agencies that took that property. Nothing in the statute requires that agencies report to the state how they have spent that money. *See generally* S.C. Code Ann. § 44-53-530 (requiring only that expenditures "be documented, and the documentation made available for audit purposes and upon request by a person under the . . . Freedom of Information Act").

The trial court correctly held that this financial incentive violates the due process guarantees of the federal and state constitutions. Order at 11–12. In Section A, Respondents explain how that holding is amply supported by caselaw from across the nation, including *Tumey*, *Ward*, *Harjo*, and *Flora*. And in Section B, Respondents demonstrate why Appellant is wrong in claiming that the record is devoid of facts to support that holding. The terms of South Carolina's forfeiture statutes are clear, and their distribution of virtually all proceeds to police and prosecutors is why the trial court correctly declared them facially invalid.

A. Dedicating Forfeiture Proceeds to Police and Prosecutors Creates an Impermissible Financial Incentive That Offends Due Process.

Due process prohibits the government from establishing a system where judicial officers face a financial incentive to raise revenue through their decisions. *See*, *e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). This kind of financial incentive can involve a personal benefit—in other words, money directly into the judge's pocket—or an institutional one. In *Ward*, for instance, a citizen charged with traffic offenses claimed that trial before the village's mayor violated due process, since "[a] major part of village income is derived from the fines, forfeitures, costs, and fees imposed by [the mayor] in his

mayor's court." 409 U.S. at 58. The Court agreed, reasoning that even though no money went directly into the mayor's pocket, he would face institutional pressure "to maintain the high level of contribution." *Id.* at 60. Moreover, this was true no matter whether the citizen could show actual bias, as due process protects against a financial incentive that would offer "a possible temptation to the average man." *Tumey*, 273 U.S. at 532.

This same principle limits the financial incentives of police and prosecutors. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). *Marshall* concerned a Department of Labor statute meant to reimburse regional offices of the Employment Standards Administration (ESA) for costs of investigating and prosecuting child-labor violations. Those offices sent any civil penalties they collected from child-labor violations to the ESA main office. Once there, the head of the ESA could (but was not required to) send some of that money back to reimburse the regional offices for the actual costs they incurred investigating and prosecuting those violations.

The Court in *Marshall* acknowledged that due process applies to prosecutors, noting that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. The Court also made clear that a personal benefit is not required; due process would also be violated if the officer's "judgment will be distorted by the prospect of *institutional gain* as a result of zealous enforcement." 446 U.S. at 250 (emphasis added). And the Court stressed that this is true regardless of whether enforcement personnel are *actually* biased, so long as bias is a "realistic possibility." *Id.*

The linchpin to the Court's decision in *Marshall* was the fact that regional offices' enforcement decisions had no bearing on how much they were reimbursed. As the Court held, because it was "the national office of the ESA, and not any assistant regional administrator, that

decides how to allocate civil penalties," those "administrators ha[d] no assurance that the penalties they assess[ed] will be returned to their offices at all." *Id*. at 246.

This break between enforcement and funding was quite real. The amounts collected through civil penalties were relatively small; as the Court noted, "[i]n 1976, the ESA collected about $151,000 in child labor penalties; in 1977, $650,000; and in 1978, $592,000." *Id*. at 245 n.6. They made up less than one percent of the ESA's overall budget, and the Court noted that ESA's national office sent more money back to the Treasury as excess funds each year than it collected in civil penalties. *Id*. at 246. Moreover, during two of those years—1976 and 1978—the ESA main office sent *no* money back to the regional offices. *Id*. And when the main office did send money back in 1977, it did so "in proportion to the amounts expended on enforcement of the child labor provisions." *Id*. As the Court stressed, "[c]ivil penalties have *never* been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices." *Id*. (emphasis added).

This break between enforcement and funding meant the scheme in *Marshall* did not raise a possibility of bias or its appearance in the Court's eyes. By contrast, in *Young v. United States* the Court cited *Marshall* in reversing a conviction obtained by a prosecutor with improper dual loyalties, explaining that prosecutors must "be guided solely by their sense of public responsibility for the attainment of justice." 481 U.S. 787, 814 (1987). *See also Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 736, 730 S.E.2d 430, 438 (2012) (holding that due process required that private counsel hired to prosecute forfeiture actions in exchange for a percentage of any forfeited proceeds be disqualified based on conflict of interest).

Marshall shows that the greatest possibility of bias or its appearance arises when the law creates a direct link between officials' enforcement decisions and how much money their office

takes in. And it is that direct link—that "eat what you kill" system—that led the trial court to hold that South Carolina's forfeiture scheme violates due process by "institutionally incentiviz[ing] forfeiture officials." Order at 11. The ESA scheme in *Marshall* allowed only for "reimbursement for the costs of determining violations and assessing penalties," 446 U.S. at 239, but South Carolina's scheme gives police and prosecutors virtually all of what they forfeit, no matter their costs. Under it, police get the first $1,000 of all seized & forfeited cash, S.C. Code Ann. § 44-53-530(f), and they and prosecutors share 95% of all other forfeiture proceeds. *Id*. at § 44-53-530(e); *see* Order at 9 (finding that "[s]urplus forfeiture funds are not remitted to the general fund and, instead, are spent by the agencies who receive the funds as their share of the statute's profit-sharing scheme"). Nothing in South Carolina law requires these agencies to submit reports to the state indicating how they have spent these funds.

Similar forfeiture schemes have been held to violate due process. In *Harjo v. City of Albuquerque*, for instance, an ordinance established a dedicated team of police and prosecutors who seized and forfeited vehicles suspected of being involved in drunk driving. 326 F. Supp. 3d 1145 (D.N.M. 2018). Proceeds from those forfeitures went into a fund dedicated for the team's use. Although the ordinance's text suggested that "a central authority—the City Council and the Mayor—exercised ultimate control over the forfeiture program's budget," discovery showed that the City Council and Mayor had ceded that control to the team by "retroactively approv[ing] spending over the" amount the team had previously been budgeted. *Id*. at 1195. That meant that the team had direct control over their own funding, which the court held violated due process because it let the team "spend as much as it raises." *Id.*; *see also id*. (noting that "there is a realistic possibility that the forfeiture program prosecutors' judgment will be distorted, because

in effect, the more revenues the prosecutor raises, the more money the forfeiture program can spend").

Likewise, in *Flora v. Southwest Iowa Narcotics Enforcement Task Force,* the court noted that Iowa Code § 809A.17 authorized law enforcement agencies and prosecutors to enter into forfeiture share agreements. 292 F. Supp. 3d 875, 905 (S.D. Iowa 2018). It reasoned that some of those agreements could satisfy due process, such as an agreement whereby agencies were reimbursed only for their actual investigative and prosecutorial costs. *Id*. But the *particular* sharing agreement at issue in Flora's case *was* constitutionally problematic because it spelled out that 70% of all forfeiture proceeds had to be turned over to law enforcement, another 20% to the prosecuting agency, and only ten percent to the state treasury. *Id*. at 904.

South Carolina's forfeiture scheme is, if anything, worse than the agreement in *Flora*. It devotes 75% of forfeiture proceeds to law enforcement, 20% to the prosecuting agency, and only five percent to the state treasury. S.C. Code Ann. § 44-53-530(e). And its terms are embodied in a *statute*, not a contract. *Id*. The incentive it creates is crystal clear: the more drug forfeitures South Carolina police and prosecutors undertake, the more forfeiture proceeds their offices take in. Appellant Jimmy Richardson, as 15th Judicial Circuit Solicitor, is on the board of the Drug Enforcement Unit (DEU). He and his officers decide what investigations and prosecutions to pursue. The plain text of South Carolina's forfeiture statute pegs the amount that the DEU keeps to how much forfeiture money the DEU takes in. *See* Order at 10 (noting that the "amount and nature of discretionary spending, determined by officials in each agency, is necessarily based on the amount of forfeiture revenue accomplished by that agency in any given year"). To keep the money flowing in, those agencies have a strong incentive to keep seizing and forfeiting property irrespective of the merits. Order at 7 (noting that "forfeiture officials . . . are affected by the

desire to generate as much money as possible through the forfeiture programs"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993) (noting government's direct pecuniary interest in forfeitures, as evidenced by an Attorney General memo urging prosecutors to increase forfeitures so the Department of Justice met its annual budget target); *see also United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 950 (9th Cir. 2010) ("Law enforcement agencies today depend, at least in part, on the proceeds of forfeiture actions to finance their activities."). In other words, the trial court was correct in holding that "South Carolina forfeiture programs have de facto power over their own spending . . . ." Order at 12.

Recent stories from around South Carolina illustrate how that power, that financial incentive at the heart of South Carolina's forfeiture statute, has affected law-enforcement priorities.[2] One news series reported that, over three years, South Carolina law-enforcement agencies brought in over $17 million in forfeiture revenue,[3] over ten times more than the ESA scheme in *Marshall*. Numerous South Carolina officials have reported that their police departments rely on forfeiture revenue, meaning they have an institutional interest in keeping that money flowing. Anna Lee et al., *SC cops defend keeping cash they seize: 'What's the incentive' otherwise?*, Greenville News, Feb. 3, 2019, https://www.greenvilleonline.com /story/news/taken/2019/02/03/sc-civil-forfeiture-police-defend-practice-say-funds-essential-law-enforcement/2746412002/ (detailing dependency of Clemson, Aiken, and Greenwood police

[2] Respondent cites this information to show the real-world consequences of South Carolina's method of distributing forfeiture proceeds, not to show the unconstitutional financial incentive. That incentive is apparent from the terms of the statute itself.

[3] Anna Lee et al., *TAKEN: How police departments make millions by seizing property*, Greenville News, Jan. 27, 2019, https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002/

departments on continued forfeiture revenue). Indeed, the executive director of the South Carolina Sheriff's Association explicitly admitted that if police don't get to keep the money from forfeiture, "what is the incentive to go out and make a special effort? What is the incentive for interdiction?" *Id*.

This financial incentive has also led to police and prosecutors controlling pots of money absent any legislative accountability. Nothing in state law requires that law enforcement agencies report to the state how they spend revenue generated through forfeiture, which has led to well-chronicled abuses. For instance, Chester County Sheriff Alex Underwood used forfeiture proceeds to book first-class airline tickets so he, his subordinate, and their wives could travel to Reno, Nevada. There, he used more funds ($11,200 in total) to upgrade his room and rent a chauffeured vehicle to pick him up from the airport. Tony Bartelme & Joseph Cranney, *SC sheriffs fly first class, bully employees and line their pockets with taxpayer money*, Post & Courier, Mar. 16, 2019, https://www.postandcourier.com/news/sc-sheriffs-fly-first-class-bully-employees-and-line-their/article_bed9eb48-2983-11e9-9a4c-9f34f02f8378.html. Spartansburg County Sheriff Chuck Wright decided that a 2012 Ford Raptor his office seized through civil forfeiture would be ideal for him to use as his company car. He decided to spend another $20,000 in forfeited funds to pay off the loan on the truck. Nathaniel Cary, *How one SC county seized more than $3.5 million in cash in 3 years*, Greenville News, Feb. 3, 2019, https://www.greenvilleonline.com/in-depth/news/taken/2019/02/03/chuck-wright-spartanburg-county-sheriff-sc-civil-forfeiture/2459032002/.

And this financial incentive has created a dangerous appearance of bias amongst the public. One woman whose husband had his money seized had to fight 20 years to get it back. When she finally succeeded, long after her husband's death, she noted her disgust: "The police

seize money, don't anybody ever think they're gonna get it back." Anna Lee et al., *Trail of targets shows breadth of lives changed by forfeiture*, Greenville News, Jan. 27, 2019, https://www.greenvilleonline.com/in-depth/news/2019/01/27/trail-people-targeted-south-carolina-police-property-seizure/2469207002/. In another example, North Charleston police seized a tattoo artist's money from his apartment while he laid in the hospital recovering from a head injury caused by a home intruder. He never got the money back, leading him to say that "[t]he robber didn't get anything, but the police got everything." Anna Lee et al., *TAKEN: How police departments make millions by seizing property*, Greenville News, Jan. 27, 2019, https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002/. And when the police seized a man's cash from the mail, the forfeiture complaint stated both that the owner's phone number was disconnected or illegible (it wasn't) and that the envelope containing the cash was over-sealed and padded to deter drug-sniffing dogs (it wasn't). When asked why the police made those misrepresentations, the owner said, "From my understanding, the only reason . . . is so they could take the money." Nathaniel Cary, *Police can seize cash in the mail. An innocent man found out the hard way*, Greenville News, Feb. 10, 2019, https://www.greenvilleonline.com/in-depth/news/taken/2019/02/10/sc-asset-forfeiture-cash-mailed-shipped-subject-seizure/2458124002/.

These facts show the pernicious, real-world, effect of the financial incentive contained in South Carolina law. It diverts law enforcement priorities, harms everyday South Carolinians, and reduces legislators' control over police and prosecutors through the appropriations process. It leads both to bias amongst officials and its appearance amongst the public. That is the result of South Carolina's statutory method of distributing forfeited assets.

B. Because the Law's Plain Text Reveals the Due Process Problem with Giving the Lion's Share of Forfeiture Proceeds to Police and Prosecutors, Nothing Prevents this Court from Declaring the Law Invalid on Its Face.

Appellant's third ground for appeal is that the trial court erred in concluding that South Carolina's scheme for distributing forfeiture proceeds facially violated due process. In support, he suggests that such a holding would require evidence that was not in the record. And he suggests, contrary to the trial court's conclusion, that the law imposes sufficient guardrails on how police and prosecutors can utilize forfeiture proceeds. But the statutory text gave the trial court all the evidence it needed to make its decision, and the few limitations on forfeiture spending that appear in the law do not meaningfully mitigate South Carolina's eat what you kill incentive.

Appellant's primary point concerns evidence. He states that "[b]eyond S.C.'s Forfeiture Statutes, there are no facts in the record about how the proceeds are distributed." Appellant's Br. 22. Based on that, he implies that no court could determine if that distribution scheme violates due process. *Id*. But no discovery or extrinsic evidence is necessary where the plain text of S.C. Code Ann. § 44-53-530 spells out the funding scheme in explicit detail. That plain text says that police get the first $1,000 of any cash seized and forfeited, as well as 75% of all other forfeiture proceeds. It requires that prosecutors get another 20%. It mandates that these proceeds go into a special, dedicated fund to "be drawn on and used only by the law enforcement agency or prosecution agency for which the account was established." S.C. Code Ann. § 44-53-530(g). That same statutory funding scheme "appl[ies] to every police agency, prosecuting agency, and governing authority in the state." Appellant's Br. 23. When the constitutional infirmity is written into the South Carolina statutes, no factual development is needed.

This same reason is why Appellant's arguments about *Harjo* miss the mark. Appellant's Br. 23. Interestingly, Appellant never disagrees with the court's conclusion in *Harjo*; instead, he merely tries to characterize that conclusion as an "as-applied analysis" since it relied on deposition testimony. *Id*. at 25. But that observation only further shows why South Carolina's forfeiture funding scheme is facially invalid.

In *Harjo*, the federal court held that Albuquerque's funding scheme created "an unconstitutional institutional incentive to prosecute forfeitures." 326 F. Supp. 3d at 1211. The plain text of Albuquerque's ordinance subjected the forfeiture team's funding to the City Council's appropriations process. But deposition testimony showed the court that the City Council had "ceded its official statutory control such that the forfeiture program officials are in de facto control of how its revenue is spent." *Id.* at 1195. That testimony revealed that Albuquerque set the team's "appropriation by estimating program revenues for the coming fiscal year." *Id*. at 1194 ("[A]ccording to the City of Albuquerque's Executive Budget Analyst, if 'we think we're going to get a million dollars in revenue, we'll allow them to spend a million in expenditures.'"). And if the team ended up forfeiting more property than expected, the team could "spend even more than appropriated," since the "City Council will retroactively authorize the spending." *Id*.

Here, such testimony is completely unnecessary. The law itself states that police and prosecutors retain 95% of all the property they seize and forfeit. The law demands that those funds go into dedicated accounts, and that "[t]hese accounts may be drawn on and used only by the law enforcement agency or prosecution agency for which the account was established." The law does not require that agencies get anyone's approval to make discrete purchases from these accounts. *See* S.C. Code Ann. § 44-53-530(g). The plain text of Section 44-53-530 shows that

police and prosecutors have control over forfeiture proceeds and how they are spent. No other law suggests otherwise.

Appellant also criticizes the court below for making factual statements that he believes the record cannot support. Appellant's Br. 22 (criticizing the trial court for assuming facts like "these programs set their own budget and can spend forfeiture funds in any amount and on any items that they choose, including recurring expenses, and without any meaningful oversight") (internal quotation marks omitted). He implies that, in fact, South Carolina law imposes significant limits on their programs' budgets, significant restrictions on how they can spend forfeiture proceeds, and significant oversight. But this is not the case.

Beyond the percentages discussed above, South Carolina law states that the first $1,000 of any cash seizure "remains with and is the property of the law enforcement agency which effected the seizure." SC Code Ann. § 44-53-530(f). As the Attorney General has previously opined, that law enforcement agency has incredibly broad discretion to spend that first $1,000 "for *any* public purpose of law enforcement." S.C. Att'y Gen. Opinion Letter, 1990 S.C. Op. Att'y Gen. 34, 1990 WL 482396 (Jan. 17, 1990) (emphasis added); *see also* S.C. Att'y Gen. Opinion Letter, 2011 WL 2648712, at *5 (June 28, 2011) (same).[4] Moreover, because "that $1,000.00 never becomes part of the county funds and subject to their regulations," the agency could spend the money without their appropriation or authorization. S.C. Att'y Gen. Opinion

[4] Courts regularly judicially notice opinions of State Attorney Generals at the motion to dismiss stage. *See, e.g.*, *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1079 (E.D. Cal. 2009) (holding that "opinions of the California Attorney General . . . are judicially noticeable persuasive, but non-binding authority" to be considered upon motion to dismiss); *see also* 1 Jones on Evidence § 2:113 (7th ed.) (noting that "a court may notice an agency regulation, act, report, record, etc. even though not included in the parties' pleadings or in the record on appeal").

Letter, 1990 S.C. Op. Att'y Gen. 34, 1990 WL 482396 (Jan. 17, 1990). And in another opinion, the Attorney General correctly noted that South Carolina's forfeiture statutes do not require agencies to document how they spend that first $1,000, or make that spending subject to audit. S.C. Att'y Gen. Opinion Letter, 2005 WL 2652378, at *2 (Aug. 3, 2005).

Nor is there meaningful oversight of other forfeited cash and property. Cash forfeitures above $1,000, as well as all property forfeitures that are converted to proceeds, go into dedicated funds that can be accessed only by the seizing and prosecuting agencies. Law enforcement agencies can spend that money on anything "used for drug enforcement activities, or for drug or other law enforcement training or education." S.C. Code Ann. § 44-53-530(g). Nor must the items purchased using money from "530(g) accounts" be used exclusively for drug enforcement; as the Attorney General has instructed, "the requirement of the statute is satisfied where the primary intent of the purchase was drug law enforcement . . . even if the department received incidental or tangential benefits from the purchase which were unrelated to drug law enforcement." S.C. Att'y Gen. Opinion Letter, 2017 WL 2399760, at *4 (May 17, 2017) (suggesting purchase of gyroplane by 15th DEU would satisfy statute even though it would be used for a variety of non-drug enforcement activities). No further evidence is needed to demonstrate police and prosecutors' discretion in spending forfeiture funds.

In fact, there is no real oversight of spending from 530(g) accounts. Appellant makes much of the fact that documentation of spending from these accounts must be "made available for audit purposes and upon request [under the Freedom of Information Act]," Appellant's Br. 22, and that expenditures from these accounts "must be made in accordance with the established procurement procedures of the jurisdiction where the account is established." *Id*. But this language is illusory: South Carolina's forfeiture statutes do not require that audits be regularly

made of spending from 530(g) accounts.[5] Nor does South Carolina law require that agencies report to SLED, or to any other state or local entity, how much they have spent from those accounts, or on what. Given that agencies acquire these funds outside the budget appropriations process, *see* S.C. Code Ann. § 44-53-530(g) (stating that forfeiture proceeds be put in "separate, special account[s] in the name of each appropriate agency"), and have broad discretion to spend them on discrete purchases without any legislative oversight, the lack of any sort of reporting requirement frustrates legislative oversight and leaves law-enforcement agencies largely to their own devices.

Allowing police and prosecutors to keep and spend the money they seize and forfeit offends due process. It creates a dedicated funding stream wholly under those agencies control. They can spend money from those accounts as they see fit, with little oversight. This has led to widely chronicled abuses. Accordingly, this Court should affirm and hold that S.C. Code Ann. § 44-53-530's method of distributing forfeited assets and proceeds violates both the federal and state constitutions.

II. The Trial Court Correctly Held That The Burdens Of Proof In South Carolina's Forfeiture Statutes Violate Due Process By Raising An Unacceptable Risk That Civil Forfeiture Will Be Used To Punish Innocent Parties.

The financial incentive created by S.C. Code Ann. § 44-53-530 is far from the only constitutional flaw with South Carolina's forfeiture statutes. In South Carolina, the government may forfeit property merely by showing probable cause to believe "a substantial connection

[5] By contrast, South Carolina law requires that all expenditures from accounts police establish to pay for tips from confidential informants "be fully documented and audited annually with the general fund of the appropriate jurisdiction." S.C. Code Ann. § 44-53-530(j).

exists between the property to be forfeited" and the commission of a crime. *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). In other words, the government need not prove that the property's *owner* did anything wrong. Instead, once the government has established probable cause connecting *the property* to a crime committed by anyone, property owners must prove their own innocence by a preponderance of the evidence. S.C. Code Ann. § 44-53-586(b).

The trial court held that "placing the burden of proof on the property owner[] violates the Due Process Clauses of the federal and South Carolina Constitutions." Order at 5. As explained in Section A, the court recognized that imposing such a burden, without first requiring the government prove those owners' personal culpability, runs afoul of on-point U.S. Supreme Court precedent, *Nelson v. Colorado*, which declared that people are presumed to be innocent—a bedrock principle of American law.

Appellant's second assignment of error criticizes the trial court's conclusion. He argues that *Nelson*'s holding is inapplicable to this case and that numerous cases have previously held that owners can be saddled with the burden of proof. He further claims that innocent-owner determinations are to be made on a case-by-case basis, and that, if the government had to prove someone's personal culpability, it would succeed in fewer forfeiture proceedings. But as Respondents demonstrate in Section B, these arguments lack merit. They misconstrue precedent, fail to appreciate the precise legal issue now before this Court, and grossly exaggerate the burdens the government will have to face if owners are presumed innocent.

A. Requiring Owners to Prove Their Innocence in Forfeiture Proceedings—Absent Any Showing of Personal Culpability by the Government—Violates Due Process.

South Carolina law allows the government to forfeit property merely by showing "probable cause for believing a substantial connection exists between the property to be forfeited

and the criminal activity." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011). In other words, the state need not prove that the property's owner did anything wrong. Instead, the property owner must prove "by a preponderance of the evidence that the property was innocently owned." *Id*. (citing S.C. Code Ann. § 44-53-586(b)). The trial court correctly found that requiring people to prove their innocence or lose their property violates due process. Order at 6. Moreover, as Respondents detail in Part IV.A, allowing the government to punish owners by taking their property, absent any showing that those owners themselves did anything wrong, also facially violates the state and federal constitutions' excessive fine guarantees.

The trial court's order relies on binding precedent from the United States Supreme Court, which has held that it violates due process to force a property owner to prove his or her innocence, while putting no burden on the government to establish that owner's personal culpability. In *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), the Supreme Court reviewed a Colorado statute that required people whose criminal convictions were overturned on appeal to prove their innocence in order to get back their property (namely, any costs, fees, and restitution they paid as part of their convictions). The Court in *Nelson* held that the *Mathews v. Eldridge* framework applied, *id*. at 1255, because the case concerned a challenge to procedures used in civil proceedings. That framework looks at (i) the nature of the private interest at stake; (ii) the risk of erroneous deprivation given the procedures already guaranteed, and whether additional procedural safeguards would prove valuable; and (iii) the government's interest and the burdens that additional procedures might impose. 137 S. Ct. at 1255 (citing 424 U.S. 319, 335 (1976)).

The Court held that all three *Mathews* factors "weigh[ed] decisively against Colorado's scheme." *Id*. In particular, it held that forcing people to prove their own innocence gave rise to an unacceptable risk of erroneous deprivation. *Id.* at 1256-57. The Court concluded that "to get

their money back, defendants should not be saddled with any proof burden." *Id.* at 1256. The Court explained that imposing such a burden on people trying to get back their property in a civil proceeding violates the "[a]xiomatic and elementary" principle that individuals are "entitled to be presumed innocent." *Id.* at 1255-56.

This case follows from *Nelson*. Under South Carolina law, officials may seize property they have probable cause to believe is connected to crime. They need not show that the owner has done anything wrong. But the presumption of innocence discussed in *Nelson* means the state cannot force people to prove their innocence or else lose their property. If people whose convictions have been overturned cannot be put to such a proof burden, then neither can owners of property seized pursuant to the state's forfeiture laws.[6] Doing so violates due process.

Courts have applied *Nelson* to the forfeiture context. As previously discussed in Part I, *supra*, Albuquerque, New Mexico recently ran a municipal forfeiture program that—like South Carolina's forfeiture statute—authorized forfeitures based on a showing that "the law enforcement officer had probable cause to seize the vehicle." Albuquerque Code § 7-6-5(E). In other words, Albuquerque's ordinance did not require the government to prove the vehicle's owner was personally culpable, only that there was probable cause to believe that *someone* had used the property illegally. And like South Carolina law, once police made that initial showing, Albuquerque forced property owners to prove their innocence, namely that "by a preponderance of evidence that [they] could not have reasonably anticipated that the vehicle could be used in a manner" justifying forfeiture. Albuquerque Code § 7-6-7(A).

[6] Owners who have not been convicted of a crime are in the same position as the owners in *Nelson*, whose convictions had been vacated. If an owner *has* been convicted, then the government can use that fact in a forfeiture proceeding, meaning it will have no trouble meeting its burden of proof.

One Albuquerque citizen, Arlene Harjo, had her car seized by police after her son had taken it under false pretenses and drove under the influence. She challenged Albuquerque's burden-shifting scheme in federal court, arguing that its requirement that she prove her own innocence violated procedural due process. The court agreed. Using the *Mathews* framework, the court quickly concluded that Harjo had "an obvious and significant interest in her car." *Harjo*, 326 F. Supp. 3d at 1207. Turning to the second *Mathews* factor, the court concluded that the "Forfeiture Ordinance's requirement that [] Harjo prove her innocence" created a significant risk of erroneous deprivation. *Id*. In so holding, the court recognized that Albuquerque's scheme required the city to prove nothing regarding the owner's culpability. *Id*. at 1207. This, the court ruled, violated *Nelson*, under which "defendants are entitled to a presumption of innocence, even in civil proceedings . . . a proof burden creates a risk of erroneous deprivation." 307 F. Supp. 3d 1163, 1211 (D.N.M. 2018). Other courts applying *Nelson* in similar circumstances have reached the same conclusion. *See City of Lebanon v. Milburn*, 286 Or. App. 212, 215–17 (2017) (ordering that *Nelson* required city to return animal it had taken through civil forfeiture after its owner was acquitted on animal-abuse charges).

The court in *Harjo* explained why the risk of erroneous deprivation was particularly high in the civil forfeiture context. First, Albuquerque's ordinance allowed police and prosecutors to retain forfeited property and proceeds. Given that, the court held that a "neutral hearing 'is of particular importance' where, as here, 'the Government has a direct pecuniary interest in the outcome of the proceeding.'" *Harjo*, 307 F. Supp. 3d at 1210 (quoting *United States v. James Daniel Good Real Property*, 510 U.S. at 55–56). The court also noted that Harjo and other owners frequently could not afford representation, meaning they had to "not only . . . navigate the hearing process and the legal requirements to prove his or her innocence, but also face[] an

experienced city attorney on the other side whose practice expertise is likely focused on the law at issue in the proceeding." 307 F. Supp. 3d at 1212. Given these concerns, the court concluded that the third *Mathews* factor— the government's interest in keeping the vehicle after the initial seizure—only weighed "slightly in the Government's favor" and could not justify forcing people to prove their own innocence. *Id.* at 1213, modified on reconsideration, 326 F. Supp. 3d 1145 (D.N.M. 2018).

The trial court correctly held that these same concerns demonstrate why South Carolina's requirement that people in civil forfeiture proceedings prove their innocence violates the federal and state constitutions. Order at 5–6. As discussed above, South Carolina's forfeiture statute allows for the seizure and forfeiture of a broad swath of real and personal property. Under the first *Mathews* factor, it is clear owners have "an obvious and significant interest" in getting their property back. *Harjo*, 326 F. Supp. 3d at 1207; *see also* Appellant's Br. 14 (not disputing that Respondent Green has an interest in his property). Under the second *Mathews* factor, *Nelson* and *Harjo* explain why South Carolina's requirement that owners prove their innocence creates a substantial risk of erroneous deprivation. That risk is exacerbated by the fact that forfeiture officials have a financial interest in the outcome of the proceeding. *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (stating that "it makes sense to scrutinize governmental action more closely when the State stands to benefit"). Moreover, South Carolina does not provide property owners contesting a forfeiture petition with legal counsel, which further raises the risk of erroneous deprivations, given the relatively small amounts involved in most forfeiture proceedings.[7] And under the third *Mathews* factor, the government has absolutely no interest in

[7] Anna Lee et al., *How civil forfeiture errors, delays enrich SC police, hurt people*, Greenville News, Jan. 29, 2019, https://www.greenvilleonline.com/in-depth/news/taken/2019/01/29/civil-forfeiture-south-carolina-errors-delays-property-seizures-exclusive-

permanently depriving people who are presumed innocent of their property absent any showing of their culpability. Given that each *Mathews* factor tips decisively against current practice, this Court should declare that "requiring a [property] owner to prove his or her innocence once the [government] has shown that it has probable cause to seize . . . creates such a risk of erroneous deprivation that it violates procedural due process." *Harjo*, 326 F. Supp. 3d at 1207.

B. Appellant's Arguments Against the Trial Court's Innocent-Owner Holding Mistake the Pertinent Legal Inquiry, Misconstrue Caselaw, and Misunderstand the Government Interest at Issue.

Appellant's brief agrees with part of the trial court's innocent-owner analysis. It recognizes, for instance, that *Mathews v. Eldridge* is the pertinent legal test to use in evaluating this procedural due process issue. Appellant's Br. 13. And it acknowledges that, under that test, Respondent Green has an interest in his seized cash. *Id*. at 14. But it argues that current practice does not create a risk of erroneous deprivation. In Appellant's view, the government has an evidentiary burden, one that requires it to show probable cause that property has a substantial connection to crime. *Id*. at 12–13. He believes that that burden is constitutionally sufficient. It is not. Like the burdens created by the statutes invalidated by *Nelson* and *Harjo*, it does not require the government to prove that the property's *owner* did anything wrong.

Appellant's main assignment of error concerns the second *Mathews* factor—the risk of erroneous deprivation given current procedures. He contends that *Nelson*'s innocent-owner holding does not apply here because it "was not a forfeiture statute." *Id*. at 14. But that contention makes no sense: Both the reimbursement hearings in *Nelson* and the forfeiture hearings in South Carolina are civil proceedings, *Nelson*, 137 S. Ct. at 1252 (describing

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investigation/2460107002/(finding that "[a] third of cash forfeitures in the state during our three-year research period, about 1,500, involved $500 or less in cash").

reimbursement hearings as "civil proceeding[s]"); *Pope*, 369 S.C. at 474, 633 S.E.2d at 151 (2006) ("An action for forfeiture of property is a civil action at law."), and Appellant recognizes that *Mathews v. Eldridge* is the operative test for such proceedings. Moreover, the Court in *Nelson* used the *Mathews* test to hold that people cannot be required to prove their innocence. *See* 137 S. Ct. at 1256 (holding that "defendants should not be saddled with any proof burden . . . they are entitled to be presumed innocent"). In other words, Appellant notes a distinction, but never shows why it makes a difference.

Appellant also tries to sideline *Nelson* by pointing out that Colorado had no affirmative evidentiary burden in reimbursement proceedings, whereas South Carolina forfeiture procedures require the prosecuting agency to establish "probable cause for believing a substantial connection exists between the property to be forfeited and the criminal activity." *See* Appellant's Br. 12. But establishing that *property* may have been involved in a crime says nothing about whether its *owner* is personally culpable. Indeed, Appellant frankly admitted to the trial court that "[t]he criminal activity could be *anyone's* criminal activity and is not restricted to Respondent Green's criminal activity." Motion to Alter or Amend 5 (emphasis added).

In fact, the court in *Harjo* rejected Appellant's precise argument. As noted above, Albuquerque's ordinance required the government to initially prove that "the law enforcement officer had probable cause to seize the vehicle." Albuquerque Code § 7-6-5(D). The city argued "that the probable cause burden it holds in proving that the vehicle was involved in a DWI sufficiently mitigates the erroneous deprivation risk." *Harjo,* 307 F. Supp. 3d at 1212, modified on reconsideration, 326 F. Supp. 3d 1145 (D.N.M. 2018). But the court rejected that conclusion, noting that "probable cause is not that high of a burden" and that such a standard "is not that much of a safeguard when permanent deprivation of something as essential as a person's vehicle

is at risk." *Id*. The court later analogized Albuquerque's argument to Colorado's argument in *Nelson* "that numerous procedures—such as probable cause to support criminal charges, the jury-trial right, and the State's burden to prove guilt beyond a reasonable doubt—'adequately minimize the risk of erroneous deprivation of property.'" *Harjo*, 326 F. Supp. 3d at 1208 (quoting *Nelson*, 137 S.Ct. at 1257). The court noted that the Supreme Court rejected that argument because none of those procedures were relevant to a defendant whose conviction had been invalidated. It similarly concluded that Albuquerque's showing of probable cause was irrelevant because it revealed nothing about the owner's culpability. *See Harjo*, 326 F. Supp. 3d at 1208. The same is true here.

In fact, Appellant's brief does not meaningfully engage with *Harjo*. Instead, it cites to *Bennis v. Michigan*, 516 U.S. 442 (1996) and other cases for the proposition that no innocent-owner defense is constitutionally required—which Appellant then implicitly suggests means that South Carolina can impose any burden on innocent owners that it wishes. Appellant's Br. 15. But a close look at *Bennis* shows why that argument carries no weight. In *Bennis*, the Supreme Court rejected the due process claim of a wife whose car was forfeited after her husband—an equal co-owner—violated the law. 516 U.S. at 443. In holding that due process did not require any payment be made to the wife, the Court emphasized that the forfeiture court had "authority to order the payment of one-half of the sale proceeds" to the wife as co-owner. But it then noted that the forfeiture court had only "declined to order such a division of sale proceeds . . . because of the age and value of the car." *Id.* at 445. The couple had recently bought the car for just $600, and the forfeiture court found that there would be "'practically nothing left minus costs.'" *Id.* On those facts, the Supreme Court found that the forfeiture's impact on Ms. Bennis did not

constitute punishment but was instead a kind of unavoidable collateral damage caused by the punishment of her husband. *Id.* at 452.

The concurring opinions of Justices Ginsburg and Thomas in *Bennis* further underscore that case's inapplicability to the innocent-owner issue now before this Court. Those Justices provided essential votes for the 5-4 decision, and their opinions both stressed the low value of the car and the fact that the husband was a co-owner. *See* 516 U.S. at 456 (Thomas, J., concurring); *id.* at 457 (Ginsburg, J., concurring). Justice Thomas concluded that the forfeiture of the wife's interest, on those facts, could "be characterized as 'remedial,'" with the result that "the more severe problems involved in punishing someone not found to have engaged in wrongdoing of any kind do not arise." *Id.* at 456.[8] And Justice Ginsburg likewise concluded that the state had "not embarked on an experiment to punish innocent third parties." *Id.* at 458.

But this Court has repeatedly recognized that South Carolina's forfeiture statutes are punitive. *See, e.g.*, *Allendale Cty. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 586, 606 S.E.2d 471, 474 (2004) ("An action for forfeiture is a civil in rem action at law that is, by its nature, a penal action that must be strictly construed."); *Moore v. Timmerman*, 276 S.C. 104, 107, 276 S.E.2d 290, 292 (1981) (holding that forfeiture statute was penal in nature and subject to strict construction); *Commercial Credit Corp. v. Webb*, 245 S.C. 53, 56, 138 S.E.2d 647, 648 (1964) (same). Moreover, given that the South Carolina legislature has said that innocent owners have a right to keep their property, the cases Appellant cites suggesting that the legislature didn't have to do that are irrelevant. After all, Colorado did not have to create a statute that allowed

[8] Justice Thomas also noted the apparent lack of any significant financial incentive to forfeit the car, observing that the "'costs'" to be covered by the $600 value of the car most likely constituted only "the costs of sale" or at most the "costs of keeping the car and law enforcement costs *related to this particular proceeding*." 516 U.S. at 456 n.* (emphasis added).

people to recover monies they paid upon conviction. But once it did, that statute had to comport with due process. The same is true here: South Carolina's forfeiture statutes contain an innocent-owner defense. S.C. Code Ann. § 44-53-586. Accordingly, South Carolina has a constitutional obligation to implement accurate procedures for determining an owner's innocence. The trial court correctly found that South Carolina's procedures violate due process by creating a distinct risk of erroneous deprivation.

Appellant also claims that if "third-party claimants were not required to" prove their innocence based on a preponderance of the evidence, "there would be few successful forfeitures." Appellant's Br. 17. But the state has no interest in forfeiting property from people who have done nothing wrong. Nor is requiring the government to demonstrate that someone is not an innocent owner some insuperable task, as Appellant's lead case—*Gowdy v. Gibson*, 391 S.C. 374, 706 S.E.2d 495 (2011)—demonstrates. There, the mother of the guilty person claimed the seized money was hers. But the government marshalled evidence demonstrating that it was more likely that she had fabricated the claim. 391 S.C. at 384-85, 706 S.E.2d at 500–01. The government put forward testimony showing, for instance, that when police seized the safe the mother did not know its combination, that she was surprised when learning that the safe contained money, and that the only way one could reach the safe (which had been in the attic) was through her son's bedroom closet. It likewise pointed out that the mother had no tax returns or other documents supporting her claim of ownership.

Gowdy shows why putting the burden on the government, as *Nelson* requires, is not a practical difficulty. When prosecutors feel that someone is not an innocent owner, they can use discovery and testimony to marshal evidence to disprove the would-be owner's claim. This is what prosecutors do every day: collect evidence, and present that evidence in court. Because

South Carolina's forfeiture statute relieves them of that burden and requires people to prove their own innocence, it violates due process.

Appellant also tries to divert this Court's attention away from the key legal issue here—the burden shifting required by South Carolina law—by saying that whether someone is an innocent owner is a case-by-case determination. Appellant's Br. 16-17. Of course it is, but that misses the point. This Court can decide the burden-shifting issue as a facial matter, given that whether the government must show any culpability on the property owner's part in order to secure a forfeiture is a common question in every forfeiture proceeding. The holdings in *Nelson* and *Harjo* require that the answer to that question be "yes," and since South Carolina law reaches an opposite conclusion, it violates due process.

Appellant also criticizes the trial court for pointing out that the government sometimes forfeits property from owners who have never been charged. Appellant's Br. 16. That criticism focuses on the fact that, in a civil forfeiture proceeding, it is technically the property on trial, not the owner. *Id*. But that form over substance criticism ignores the core holding of *Nelson*, that the government cannot force people to prove their innocence in order to get their property back. The presumption of innocence means the government cannot punish you without showing you did something wrong, no matter how the case is formally captioned. Because South Carolina's burden-shifting scheme forces owners to prove their innocence absent any showing of personal culpability, it violates due process.

III. The Trial Court Correctly Concluded That South Carolina's Failure To Require Prompt, Post-Seizure Hearings Violates Due Process.

The trial court also analyzed what avenues of relief South Carolina's forfeiture statutes provide to people who have had their property seized. Under South Carolina law, seized property is subject "only to the orders of the court having jurisdiction over the forfeiture

proceedings." S.C. Code Ann. § 44-53-520(d). For those proceedings to begin, prosecutors must file a forfeiture petition, which they can do "within a reasonable time" following seizure. *Id.* § 44-53-520(c). South Carolina law does not dictate that property owners be provided prompt, post-seizure hearings to challenge, among other things, the validity of the seizure and the continued retention of the property pending the forfeiture proceeding's final outcome. Unless a property owner brings an entirely new civil proceeding in court, he or she must wait until the forfeiture proceeding runs its course, months or years later, in order to get their property back.

The trial court correctly concluded that South Carolina's failure to provide owners with a prompt, post-seizure hearing violates due process, Order at 14, which requires that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). As Respondents explain in Section A, the clear weight of authority states that prompt, post-seizure hearings are a means to prevent erroneous deprivations of property. And it is this case law that has led numerous courts across the country to require such hearings in the forfeiture context, where the seizing agency had a direct pecuniary interest in the outcome.

Appellant's fourth assignment of error claims that the trial court erred because no pre-seizure hearing is required, because the "reasonable time" standard is more than sufficient, and because any delays in when hearings occur are the fault of the courts, not the state. But as Respondents demonstrate in Section B, these arguments fail to appreciate the facts of this case, the proper standard of review, and how courts should address a constitutionally infirm scheme like this one.

A. Due Process Demands That Owners of Personal Property be Given Prompt Post-Seizure Hearings at Which They Can Challenge the Continued Deprivation of Their Property.

One long-standing feature of United States Supreme Court case law has been that statutes authorizing property seizures must provide a prompt hearing at which owners may contest the temporary deprivations of their property. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972) (striking down seizure of stove, stereo, table, bed, and other household goods because there was no prompt hearing).

This same principle applies in the civil-forfeiture context. For real property, the U.S. Supreme Court held in *United States v. James Daniel Good*, 510 U.S. 43 (1993) that the government must provide notice and a hearing *before* it may seize real property. As to personal property, the Supreme Court held in *Calero-Toledo v. Pearson Yacht Leasing Co*., that post-seizure notice and opportunity for a hearing would suffice, in part because "seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes." 416 U.S. 663, 679 (1974).[9] But even under that lesser burden, the government must still give owners due process in the form of prompt and adequate post-seizure remedies. This requirement is analogous to the government's duty to provide a prompt hearing to those arrested without a warrant. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 112–13 (1975) (requiring prompt probable cause determination due to risk of unfounded charges when arrest is based on evidence interpreted "by the officer

[9] It is important to note that when the Court decided *Calero-Toledo*, Puerto Rico officials could not personally or institutionally benefit from forfeiture. Puerto Rico Stat. Ann. § 33-1722(d) (1974) (stating that when "the vehicle, mount, or vessel or plane is sold at auction, the proceeds from the sale shall be covered into the general fund of the Government of Puerto Rico"). But today, South Carolina's police and prosecutors keep at least 95% of all forfeiture proceeds, making it difficult to describe them as disinterested.

engaged in the often competitive enterprise of ferreting out crime"(citations omitted)). And this requirement logically follows from the Supreme Court's decision in *James Daniel Good*: If the government must provide a hearing *before* it can seize real property, surely government must at least provide a comparable hearing shortly after it seizes personal property—not months or years down the line.

Applying the *Mathews v. Eldridge* factors shows why South Carolina's failure to provide prompt post-seizure hearings to property owners violates due process. The first *Mathews* factor, the private interest at stake, is substantial. Here, the government seized Mr. Green's cash, which Appellant has already noted he has a property interest in. Appellant's Br. 14. And South Carolina's drug forfeiture statute allows the government to seize all manners of personal property, including "all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels." S.C. Code Ann. § 44-53-520(a)(6).

The second *Mathews* factor—the risk that property owners will be erroneously deprived of their property under current procedures—also weighs in property owners' interest. Prosecutors play an outsized role in the forfeiture process. They are the ones who file the petitions that initiate forfeiture proceedings. South Carolina law requires that those proceedings must begin before an owner can ask that court to return his or her property. *See* S.C. Code Ann. § 44-53-520(d)(stating that "[a]ny property taken or detained . . . is considered to be in the custody of the department making the seizure subject only to the orders of the court having jurisdiction over the forfeiture proceedings"). Because South Carolina law does not mandate that post-seizure hearings be given to property owners, those owners must either choose to launch their own independent litigation or else wait months, if not years, to have their day in court.

Further exacerbating the risk of erroneous deprivation is the fact that South Carolina law does not provide property owners with counsel in civil forfeiture proceedings. This means that often owners will give up on getting their property back, no matter the merits of their case, or else negotiate a settlement with prosecutors. Settlement can occur even before prosecutors present their theory of the case via an initial pleading. S.C. Code Ann. § 44-53-530(d) (stating that "[a]ny forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices"). And the Attorney General has told prosecutors they can negotiate deals whereby they reduce criminal charges "in exchange for a voluntary consent to the forfeiture of any seized property." S.C. Att'y Gen., Opinion Letter, 2008 WL 4489045 (Sept. 19, 2008). Given that prosecuting agencies get to keep 20% of whatever they settle for, S.C. Code Ann. § 44-53-530(e), the risk that people will be permanently deprived of some or all their property is severe.

Moreover, even if owners choose to keep litigating and ultimately prevail, the lack of a prompt post-seizure hearing will still work a real harm. As the Supreme Court has cautioned, a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented." *James Daniel Good*, 510 U.S. at 56 (citation omitted); *see also Connecticut v. Doehr*, 501 U.S. 1, 15 (1991) ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 20 (1978) ("Although utility services may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

By contrast, requiring that South Carolina law provide owners with prompt post-seizure hearings would give those owners a simple and inexpensive way to challenge the initial seizure

and continued detention of their property. That is why Justice Sotomayor, when sitting on the Court of Appeals for the Second Circuit, concluded in *Krimstock v. Kelly* that due process required New York City's DWI forfeiture ordinance to provide a prompt post-seizure hearing. 306 F.3d 40 (2d Cir. 2002). And it is why the trial court correctly recognized, Order at 12–14, that the overwhelming weight of authority across the country demands that the government give owners prompt post-seizure hearings. These cases include:

- *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976) (due process required immediate release of car pending forfeiture proceedings);
- *Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957, 978-79 (S.D. Ind. 2017) (same);
- *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 100-07 (D.D.C. 2012) (same);
- *Razzano v. Cty. of Nassau*, 765 F. Supp. 2d 176, 189 (E.D.N.Y. 2011) (holding that owner of firearms was entitled to "a prompt due process hearing following the seizure of his longarms");
- *Pollgreen v. Morris*, 496 F. Supp. 1042, 1052 (S.D. Fla. 1980) (holding it was constitutionally required, pursuant to *Mathews* factors, to provide boat owners with prompt post-seizure hearing);
- *Cty. of Nassau v. Canavan*, 1 N.Y.3d 134, 142, 802 N.E.2d 616, 624 (2003) (requiring prompt post-seizure hearings for DWI forfeitures, which it concluded would "minimize the risk of erroneous deprivation");
- *State ex rel. Schrunk v. Metz*, 125 Or.App. 405, 417, 867 P.2d 503, 510 (1993) (recognizing that "a prompt post-seizure hearing in which a claimant may contest the validity of the seizure order would unquestionably minimize the risk of error");
- *Dep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 965 (Fla. 1991) (stating that due process requires "the opportunity for an adversarial preliminary hearing [be] made available as soon as possible after seizure");
- *McFadden v. Downriver Area Narcotics Org.*, 90 Mich. App. 748, 749, 282 N.W.2d 464, 465–66 (1979) (holding that government had to give owner of $5,800 prompt post-seizure hearing);

- *State v. Matheason*, 84 Wash. 2d 130, 134, 524 P.2d 388, 390 (1974) (holding that forfeiture scheme identical to South Carolina's violated due process because it failed to provide prompt post-seizure hearing).

Appellant does not cite any of these cases in his briefing, even though the court below relied upon many of them in its order. Nor does Appellant explain why all of these courts were wrong, or why indeterminate delay is constitutionally permissible.

Nor does the third *Mathews* factor—the government's interest and the burdens associated with additional procedures—change this analysis. The government of course has an interest in eliminating contraband and depriving wrongdoers of illicitly obtained or used property. But South Carolina law already accounts for that interest; except for real property, South Carolina officials may seize suspected forfeitable items without providing *pre-seizure* notice. *See* S.C. Code Ann. § 44-53-520(b). Once the property is in the government's possession, though, that interest is satisfied. Giving owners a prompt *post*-seizure hearing would allow them to seek a judicial determination of whether the "*continued* retention of their [property] . . . is valid and justified." *Krimstock*, 306 F.3d at 65. It could be unjustified either because the government cannot meet its initial burden, or because "other means of restraint would accomplish the [government's] goals." *Id*.

Appellant does not claim that affording property owners prompt post-seizure hearings would impose any practical hardship or administrative burden, nor could he. As the Supreme Court noted in *Mathews*, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." 424 U.S. at 348. And courts reviewing forfeiture procedures have repeatedly rejected the government's plea that providing people with prompt hearings would be too burdensome. In *Washington v. Marion County Prosecutor*, for instance, plaintiffs brought a class action to challenge Indiana's failure to provide

prompt post-seizure hearings. Officials argued that providing a hearing would be overly burdensome, but the court rebuffed that argument. As it pointed out, "due process always imposes some burden on governmental actors." 264 F. Supp. 3d at 978. Recognizing that "the government already has experience with conducting post-arrest probable-cause hearings," *see id.*, the court reasoned that officials could conduct prompt post-seizure hearings in a similar manner. And when the District of Columbia argued that prompt post-seizure hearings would be too burdensome, the court in *Simms* rejected the argument because it "present[ed] no evidence regarding the potential burden of alternative procedural measures." 872 F. Supp. 2d at 103–04. Indeed, the state of Florida has no problem providing owners with prompt post-seizure hearings when it detains property pursuant to the Florida Contraband Forfeiture Act. Fla. Stat. Ann. § 932.703(3)(a). There is no reason such a task would be too burdensome for South Carolina officials.

B. Appellant's Arguments Against the Trial Court's Prompt Post-Seizure Holding Fail to Appreciate Governing Jurisprudence and That the Failure to Provide Such Hearings Is Unconstitutional No Matter Whose Responsibility It Is to Provide Those Hearings.

Appellant's fourth ground for appeal concerns the trial court's prompt post-seizure holding. But his analysis misunderstands the pertinent legal issue, misidentifies the pertinent legal test—*Mathews v. Eldridge*—and mistakenly suggests that this Court is unable to correct this constitutional infirmity simply because prosecutors are not the ones in charge of the docket.

Appellant's initial argument regarding the timing of judicial review states that "[t]he Due Process Clause does not require S.C.'s Forfeiture Statutes to have a pre-seizure hearing." Appellant's Br. 26. In support, he cites this Court's decision in *Myers v. Real Property at 1518 Holmes St.*, 306 S.C. 232, 236, 411 S.E.2d 209, 212 (1991) ("We find no authority that seizure of real property requires *pre*-seizure notice and hearing."). But Appellant's argument on this point

is both irrelevant and incorrect. It is irrelevant because, as described in Section A, no pre-seizure notice is required for personal property like Respondent Green's currency. And it is incorrect because, two years after *Myers*, the United States Supreme Court reached the exact opposite conclusion in *United States v. James Daniel Good*, 510 U.S. 43 (1993), where it held that the government must provide notice and a hearing *before* it may seize real property.

Second, Appellant suggests that the *Mathews v. Eldridge* test used in *James Daniel Good* is not the test this Court should use in judging whether a prompt post-seizure hearing is constitutionally required. Instead, Appellant points to the test used for speedy-trial determinations. Appellant's Br. 28 (citing *U.S. v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555 (1983)). He further argues that, if a prosecutor does not file a petition within a "reasonable period of time," courts may dismiss the matter under that test. Appellant's Br. 27–28.

But the *$8,850* framework has no bearing here. The issue here is not about whether prosecutors are taking too long to file cases, but about how the law gives property owners no way to promptly challenge the continued detention of their property. It is that distinction which has led courts facing similar forfeiture schemes to reject *$8,850* and instead find that *Mathews v. Eldridge* provides the right decisional framework. In *Smith v. City of Chicago*, the Seventh Circuit rejected Chicago's similar argument because "*$8,850* concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure." 524 F.3d 834, 837 (7th Cir. 2008), *vacated as moot and remanded sub nom*. *Alvarez v. Smith*, 558 U.S. 87 (2009). Likewise, in *Krimstock* the Second Circuit rejected *$8,850* in favor of *Mathews*, recognizing that "[t]he Constitution . . . distinguishes between the need for prompt review of the propriety of continued

government custody, on the one hand, and delays in rendering final judgment, on the other." 306 F.3d at 68; *see also Simms*, 872 F. Supp. 2d at 100 (holding that *Mathews*, rather than *$8,850*, controls after noting the defendant did not "explain why *Mathews* protections do not apply to protect the owner's property rights *pendente lite*").

Appellant also claims that the trial court's prompt post-seizure holding depended upon the fact that prosecutors are somehow at fault for the lack of prompt post-seizure hearings, but in fact courts are the ones to decide when to hear a forfeiture proceeding. Appellant's Br. 29–30. This misunderstands the issue before this Court. It is not when the *final* forfeiture proceeding occurs, but whether South Carolina law gives owners a way to promptly challenge the seizure of their property and its continued detention *pendente lite*. They do not. Whether that is the fault of the legislative, executive, or judicial branch is immaterial. Because South Carolina law does not provide owners with prompt post-seizure hearings, it violates procedural due process, and this Court should affirm the trial court's holding on this front.

IV. This Court Should Affirm The Trial Court's Conclusion That South Carolina's Forfeiture Statutes Violate Federal And State Excessiveness Protections By Compelling Forfeiture Of Innocent People's Property, And It Should Simultaneously Update South Carolina's Excessiveness Test To Comport With Modern Jurisprudence.

The Court should affirm the trial court's decision that S.C. Code Ann. §§ 44-53-520 and 530 are facially unconstitutional under the Excessive Fines Clause of the Eighth Amendment and Article I, Section 15 of the South Carolina Constitution. Respondents explain in Section A why the trial court's decision reflects a basic tenet of the excessiveness protections contained in the federal and state constitutions—that no person's property can be taken away unless that person did something wrong. In Section B, Respondents then demonstrate why Appellant's complaints about the trial court's invocation of *Timbs* are misplaced and why a facial holding is warranted

here. And in Section C, Respondents discuss the Indiana Supreme Court's recent decision in *Timbs* and why this Court should look to that decision in updating its excessiveness test to reflect modern jurisprudence.

A. Because South Carolina's Forfeiture Statutes Permit Forfeiture Absent Any Proof of Personal Culpability, They Facially Violate the Eighth Amendment and Article I, Section 15.

As this Court has repeatedly held, South Carolina's civil forfeiture statutes are penal in nature. *Allendale Cty. Sheriff's Office*, 361 S.C. at 586, 606 S.E.2d at 474. That is because those statutes are meant, at least in part, to punish an owner when his or her property is connected to a crime. *Leonard v. Texas*, 137 S. Ct. 847 (2017) (statement of Thomas, J., respecting denial of certiorari) ("Modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes."). But as discussed in Part II, *supra*, South Carolina law *requires* the Court to order forfeiture of a person's property when the state shows merely probable cause that property is connected to a crime. The law does not require the government to prove that the owner was the one responsible for the misuse of his or her property.

It was that ability to forfeit property from someone, absent any showing of his or her culpability, that the trial court held facially violated the Eighth Amendment. Order at 5 (holding that state law authorizing forfeiture "without evidence proving that the [property owner] committed an offense" justified facial relief). That holding was correct because, absent some affirmative burden to show that the owner of property is personally culpable, the state can never honor the "touchstone" of excessiveness protections: the "principle of proportionality," under which "the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Put differently, the Constitution requires an offense so grave as to warrant a proportional forfeiture; but the

South Carolina statutes allow for *limitless* forfeiture even when the government has not shown that the property's owner has done *anything* wrong.

This runs counter to the very purpose of the Excessive Fines Clause, which is to "limit[] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *Bajakajian*, 524 U.S. at 327–28). And it is why forfeiture is *always* excessive absent proof that the property owner committed an offense or acquiesced in someone else's commission of an offense. A law requiring forfeiture in such circumstances violates the guarantees of the Eighth Amendment on its face. *See State v. Yang*, 397 Mont. 486, 498, 452 P.3d 897, 904 (2019) (holding law "unconstitutional in all of its applications because it completely prohibits a district court from considering whether the 35%-market-value fine is grossly disproportionate to the offense committed").

This reasoning shows why the trial court was correct in holding that South Carolina law (specifically, S.C. Code Ann. §§ 44-53-520, -530, and -586) fail on their face, because they unconstitutionally authorize forfeiture even when the state has not shown that an owner has done anything wrong. In every case, those laws put no affirmative burden on the state to demonstrate a property owner's offense; instead, an innocent owner bears the burden to intervene in the forfeiture proceeding and affirmatively prove his or her blamelessness. In every case, this inversion of the principle of innocent until proven guilty violates the excessiveness protections of the state and federal constitutions.

B. Appellant Errs in Arguing That the Trial Court Improperly Relied on *Timbs*, and That Excessive Fine Claims May Only Proceed on a Case-by-Case Basis.

Appellant's first assignment of error contends that the trial court erred in holding that South Carolina's forfeiture system facially violates the Eighth Amendment and Article I, Section 15 by authorizing forfeiture without evidence of the owner's personal culpability. It mistakenly suggests that the court relied on the United States Supreme Court's recent decision in *Timbs v. Indiana* as the basis for its facial holding. Appellant's Br. 7–8. But that isn't right. The trial court opinion only cites the Supreme Court's *Timbs* decision twice. The first time is merely to enunciate the excessive fines standard first laid out in *Bajakajian*. Order at 4. And the second announces *Timbs*' holding that "[t]he Excessive Fines Clause applies to the states under the Fourteenth Amendment's Due Process Clause." *Id*. The trial court does not cite *Timbs* for any other substantive point of law. Therefore, Appellant's suggestion that the trial court "did not explain why or how *Timbs* rendered S.C.'s Forfeiture Statutes unconstitutional," Appellant's Br. 8, is more misleading than illuminating.

Appellant also stresses that excessive-fines determinations are typically done on a case-by-case basis, Appellant's Br. 10, but the defect the trial court identified in South Carolina law is not case by case. It infects every single forfeiture case that comes before a court, as it always authorizes forfeiture absent any showing of personal culpability. This comes directly from the text of South Carolina law, which requires owners to demonstrate their innocence by a preponderance of the evidence to get their property back. S.C. Code Ann. § 44-53-586; *see also Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011) (detailing forfeiture procedure arising under S.C. Code Ann. §§ 44-53-520 and -586). Where the text of the statute plainly spells out the constitutional infirmity, facial relief is warranted. *Knotts v. S.C. Dep't of Nat. Res.*,

348 S.C. 1, 7 (2002) (holding statute facially unconstitutional under separation of power principles where its text authorized a legislative delegation to "execute or enforce a law").

C. The Court Should Update Its Excessive Fines Analysis to Account for Jurisprudential Developments.

No matter how this Court resolves the excessive-fines issue, it should seize this opportunity to update its test for evaluating excessive-fines claims. *See Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 132–33 (1996). As Appellant recognizes, the test articulated in *Medlock* was superseded two years later by the Supreme Court's decision in *Bajakajian*. *See* Appellant's Br. 11. Respondents agree: The Court should "adopt the *Bajakajian* test." *Id.* However, Respondents urge the Court to consider the Indiana Supreme Court's recent articulation of that test, which incorporates both *Bajakajian* and all of the available case law developed since *Bajakajian*, including the principal authority relied on below.

After the Supreme Court's decision that the Eighth Amendment's Excessive Fines Clause applies to the states, *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Indiana Supreme Court on remand performed a comprehensive review of authority since *Bajakajian*. *See State v. Timbs*, 134 N.E.3d 12, 24–39 (Ind. 2019). Based on that comprehensive review, the court adopted a test for excessiveness that distinguishes between the proceeds and instrumentalities of crime. When property represents the direct proceeds of crime, it is never excessive to forfeit the property. But when property is used in the commission of a crime, excessiveness is determined based on all of the circumstances of the particular crime and particular offender.

Three broad considerations are relevant under the *Timbs* test: The harshness of the forfeiture, the severity of the offense, and the culpability of the property owner. *Id.* at 36–39. For each of these broad considerations, Indiana courts weigh several non-exclusive factors.[10] *Id.*

The virtue of the *Timbs* standard is two-fold. Unlike *Medlock*, *Timbs* is based on all of the excessiveness case law that has come down over the last 24 years. And, unlike *Medlock*, *Timbs* focuses courts on the constitutionally significant questions of proportionality and culpability. The Colorado Supreme Court also re-evaluated its excessive fines jurisprudence along similar lines in light of the Supreme Court's holding in *Timbs. See, e.g.*, *Colorado Dep't of Lab. & Emp't v. Dami Hosp*., *LLC,*, 2019 CO 47M, ¶ 38, 442 P.3d 94, 103. But the Indiana Supreme Court's analysis is the most robust framework yet developed.

Respondents agree that *Medlock* should be updated, and that *Bajakajian* provides the correct framework for updating *Medlock.* But Respondents go one step further than Appellant in urging this Court to adopt the most recent and comprehensive state high court decision applying *Bajakajian*. That decision is *Timbs*.

[10] In considering the harshness of forfeiture, courts weigh: (1) the extent to which the forfeiture would remedy the harm caused; (2) the property's role in the underlying offenses; (3) the property's use in other activities, criminal or lawful; (4) the property's market value; (5) other sanctions imposed on the property owner; and (6) effects the forfeiture will have on the property owner. When considering the severity of the offense, courts weigh: (1) the seriousness of the statutory offense, considering statutory penalties; (2) the seriousness of the specific crime committed compared to other variants of the offense, considering any sentences imposed; (3) the harm caused by the crime committed; and (4) the relationship of the offense to other criminal activity. And, when considering the culpability of the property owner, courts weigh: (1) the owner's blameworthiness; and (2) where the owner falls on the spectrum of culpability from being innocent of the criminal use of their property to willfully and repeatedly using it for criminal purposes. *Id.* at 36–39.

No one should lose their property without a court first deciding that they personally did something deserving punishment. The test set out in *Timbs* is, unlike South Carolina's forfeiture statutes, consistent with that principle. This Court should affirm the trial court's order striking down those statutes on their face and adopt the *Timbs* standard so as to alert lower courts to be on the lookout for excessive forfeitures that may violate the federal and state constitutions.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling below and declare that

i) South Carolina's method of distributing forfeiture proceeds violates the due process guarantees of the 14th Amendment of the U.S. Constitution and Article I, Section 3 of the South Carolina Constitution;

ii) South Carolina's requirement that owners prove their innocence, while not requiring the government to prove the owner's personal culpability, violates due process;

iii) South Carolina's failure to provide prompt, post-seizure hearings to owners of seized personal property violates due process; and

iv) South Carolina's requirement that property be forfeited absent any showing of guilt on the part of its owner violates the excessive fines provisions of the Eighth Amendment of the U.S. Constitution and Article I, Section 15 of the South Carolina Constitution.

Dated: July 15, 2020

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**Motions for admission pro hac vice pending*

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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2017-CP-26-07411

(Appellate Case No. 2020-000092)

Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,
On behalf of the 15th Judicial Circuit Drug Enforcement Unit.....Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars
($20,771.00), U.S. Currency and Travis Green ..... Respondents.

PROOF OF SERVICE

I hereby certify that on this 15th day of July, 2020, I electronically filed the forgoing *Initial Brief of Respondents'* with the South Carolina Supreme Court via email and I served a copy via email on the following counsel for Appellant:

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