No. S23G0701

In the Supreme Court of Georgia

GARRETT SMITH, et al.,

Appellants,

v.

STATE OF GEORGIA,

Appellee.

On Appeal from the Georgia Court of Appeals
Case No. A22A1455

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

ARGUMENT 4

I. The Court of Appeals' decision misconstrues § 9-16-12 in a way that undermines its purpose of ensuring two essential components of due process law: adequate notice and a timely hearing 7

A. The use of the phrase "essential elements" in § 9-16-12(a)indicates that the General Assembly intended to tie the pleading standards for forfeiture complaints to the due process standards for indictments, and those standards were not met here.....9

B. The text, context, and purpose of § 9-16-12(f) demonstrate that the identity of "the last claimant [to be] served with the complaint" is fixed at the time "answer is filed."....14

II. It is fundamental maxim of Anglo-American jurisprudence that penal statutes—both civil and criminal—are to be strictly construed.....19

A. The notice justification for the strict construction of penal statutes is no less applicable to forfeiture than it is to criminal punishment 21

B. Separation of powers concerns undergirding strict construction are even more acute in civil forfeiture actions than in criminal proceedings.....24

C. The rule of strict construction applies to the procedural aspects of penal statutes no less than it does to their substance 26

CONCLUSION 30

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

Page(s)

Cases

Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treas.,
686 F.3d 965 (9th Cir. 2012) 12

Alvarez v. Smith,
558 U.S. 87 (2009) 18

Arizona v. Washington,
434 U.S. 497 (1978) 22

Backus v. Gould,
48 U.S. (7 How.) 798 (1849) 22

Banta v. State,
281 Ga. 615 (2007) 21

Bennis v. Michigan,
516 U.S. 442 (1996) 13

Borders v. State,
270 Ga. 804 (1999) 11

Brassfield & Gorrie v. Ogletree,
241 Ga. App. 56 (1999) 14

Brown v. Jacobs Pharm. Co.,
115 Ga. 429 (1902) 7

Cisco v. State,
285 Ga. 656 (2009) 20

Coates v. State,
304 Ga. 329 (2018) 29

Cobb v. State,
246 Ga. 619 (1980) 22

Culley v. Marshall,
143 S. Ct. 1746 (2023) 18

DeFrancis v. Manning,
246 Ga. 307 (1980) 12

DePalma v. State,
225 Ga. 465 (1969) 22

Dohany v. Rogers,
281 U.S. 362 (1930) 9

Dove v. Dove,
285 Ga. 647 (2009) 11

Ex parte Vallandigham,
28 F. Cas. 874 (C.C.S.D. Ohio 1863) 10

Ford v. Ford,
270 Ga. 314 (1998) 10

Fullwood v. Sivley,
271 Ga. 248 (1999) 14

Gen. Motors Acceptance Corp. v. State,
279 Ga. 328 (2005) 4

Gen. Motors Acceptance Corp. v. United States,
286 U.S. 49 (1932) 10

Gete v. INS,
121 F.3d 1285 (9th Cir. 1997) 13

Gideon v. Wainwright,
372 U.S. 335 (1963) 23

Glover v. State,
272 Ga. 639 (2000) 26

Goodwin v. State,
321 Ga. App. 548 (2013) 14

Grant Co. v. United States,
254 U.S. 505 (1921).....7

Green v. State,
223 Ga. App. 467 (1996) 11

Hanna v. Plumer,
380 U.S. 460 (1965).....27

Harjo v. City of Albuquerque,
326 F. Supp. 3d 1145 (D.N.M. 2018) 3

Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.,
467 U.S. 51 (1984).....29

Ingram v. Wayne County,
81 F.4th 603 (6th Cir. 2023).....17, 18

Johnson v. Zerbst,
304 U.S. 458 (1938).....28

Kashem v. Barr,
941 F.3d 358 (9th Cir. 2019).....12

Krimstock v. Kelly,
306 F.3d 40 (2d Cir. 2002).....18

Leonard v. Texas,
137 S. Ct. 847 (2017).....20

Lizana v. State,
287 Ga. 184 (2010) 11

Lovett v. State,
111 Ga. App. 295 (1965).....19

McDowell v. State,
290 Ga. App. 538 (2008) 16, 17, 29

McLean v. State,
4 Ga. 335 (1848) 8

Morissette v. United States,
342 U.S. 246 (1952).....11

Morrow v. State,
186 Ga. App. 615 (1988) 27

Murray's Lessee v. Hoboken Land & Imp. Co.,
59 U.S. (18 How.) 272 (1855) 8

Pabey v. State,
262 Ga. App. 272 (2003) 4

Prop. Clerk v. Harris,
878 N.E.2d 1004 (N.Y. 2007) 18

Roby v. Newton,
121 Ga. 679 (1905) 20

Rounsaville v. State,
345 Ga. App. 899 (2018) 14

Sekhar v. United States,
570 U.S. 729 (2013).....11

Sessions v. Dimaya,
138 S. Ct. 1204 (2018).....9

Smith v. City of Chicago,
524 F.3d 834 (7th Cir. 2008).....18

Smith v. State,
366 Ga. App. 815 (2023) 11, 14, 15, 16

Snitko v. United States,
2021 WL 3139706, (C.D. Cal. July 23, 2021).....18

Snitko v. United States,
2021 WL 3139707 (C.D. Cal. June 22, 2021).....13

St. Regis Paper Co. v. United States,
368 U.S. 208 (1961).....29

State v. Henderson,
263 Ga. 508 (1993).....15

State v. Williams,
278 Ga. 447 (2004).....4, 12, 26

Swails v. State,
263 Ga. 276 (1993).....25

Swan v. State,
29 Ga. 616 (1860).....4, 20, 27

The Adventure,
1 F. Cas. 202 (C.C. Va. 1812).....19

The Caroline,
11 U.S. (7 Cranch) 496 (1813).....10

The Emily,
22 U.S. (9 Wheat.) 381 (1824).....20

Thomas v. State,
366 Ga. App. 738 (2023).....12

Turner v. State,
234 Ga. App. 878 (1998).....17

United States v. $8,850 in U.S. Currency,
461 U.S. 555 (1983).....18

United States v. Burr,
25 F. Cas. 55 (C.C.D. Va. 1807) 10, 21

United States v. Davis,
139 S. Ct. 2319 (2019).....21

United States v. Eighty-Four Boxes of Sugar,
32 U.S. (7 Pet.) 453 (1833).....19

United States v. Hess,
124 U.S. 483 (1888).....12

United States v. One 1936 Model Ford V-8 De Luxe Coach,
307 U.S. 219 (1939).....20

United States v. Open Boat,
27 F. Cas. 354 (C.C.D. Me. 1829) 29

United States v. Santos,
553 U.S. 507 (2008).....24

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820).....19, 20, 24

Van Buren v. United States,
141 S. Ct. 1648 (2021).....30

Walker v. State,
146 Ga. App. 237 (1978) 22

Walker v. United States,
342 F.2d 22 (5th Cir. 1965).....12

Walton v. Davis,
188 Ga. 56, 63 (1939) 8

Weaver v. State,
299 Ga. App. 718 (2009) 27

Wingard v. State,
13 Ga. 396 (1853) 10

Wooden v. United States,
595 U.S. 360 (2022) 19, 21, 24

Yates v. United States,
574 U.S. 528 (2015) 30

Yeomans v. Williams,
117 Ga. 800 (1903) 14

Constitutional Provisions

Ga. Const. art. I, § I, para. XI(a) 25

Ga. Const. art. I, § II, para. III 24

Statutes

O.C.G.A. § 9-11-15 26

O.C.G.A. §§ 9-16-1 *et seq.* 7, 11

O.C.G.A. § 9-16-12 ..... 5, 7, 8

O.C.G.A. § 9-16-12(a) ..... *passim*

O.C.G.A. § 9-16-12(f) ..... *passim*

O.C.G.A. § 9-16-19(f) 1-2

O.C.G.A. § 16-13-49(n) 26

Other Authorities

16B Am. Jur. 2d *Constitutional Law* § 976 9

Brian D. Kelly,
Fighting Crime or Raising Revenue: Testing Opposing Views of Forfeiture (2019) 2

Chris Joyner & Bill Rankin,
'Like a Slush Fund': Revenue Agents Bought Pricey Perks with Seized Assets,
Atl. J.-Const. (Mar. 12, 2020) 2

Complaint,
Martin v. FBI, No. 1:23-CV-00618 (D.D.C. filed Mar 7, 2023) 27

Decl. of Joseph Ruiz,
Snitko v. United States, No. 2:21-CV-04405 (C.D. Cal. June 3, 2021) 18

Edward Coke,
Institutes of the Laws of England (London, W. Rawlins 6th ed. 1681) 9

Felix Frankfurter,
Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947) ...11

Henry E. Smith,
Equity as Meta-Law, 130 Yale L.J. 1050 (2021) 17

Justin Gray,
GA Police Legally Seized Cars Without Proving Wrongdoing in Court, Failed to Report to State, WSB-TV (Feb. 13, 2023) 4, 18

Lisa Knepper et al.,
Policing for Profit: The Abuse of Civil Asset Forfeiture (3d ed. 2020).....*passim*

Max Crema & Lawrence B. Solum,
The Original Meaning of "Due Process of Law" in the Fifth Amendment, 108
Va. L. Rev. 447 (2022) 9

Randy Travis,
Georgia Sheriff Assigns Himself $70,000 Performance Car Bought with Seized Drug Money, FOX 5 Atl. (June 26, 2018) 2

Suja A. Thomas,
Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States,
55 Wm. & Mary L. Rev. 1195 (2014).....25

U.S. Commission on Civil Rights,
Civil Asset Forfeiture and its Impact on Communities of Color in Georgia (2022) 3, 23

William Blackstone,
Commentaries 16, 17

INTEREST OF AMICUS CURIAE

The Institute for Justice ("IJ") is a nonprofit, public interest law firm that litigates to uphold individuals' constitutional rights. Over the past decade, IJ has become the nation's leading advocate against forfeiture abuse. IJ is interested in this case because it raises important questions concerning the protections that should be afforded to private property owners in civil forfeiture cases.

The decision below, if allowed to stand, severely undermines the already limited safeguards for those whose property is taken for civil forfeiture. This case provides an important opportunity for this Court to affirm that those procedural safeguards—including adequately pleading the basis for the forfeiture and timely providing a trial to those whose property was seized—genuinely impose meaningful limitations on government action that protect private property rights.

INTRODUCTION

Property owners in Georgia have some of the nation's weakest procedural protections against wrongful civil forfeiture. *See* Lisa Knepper et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 42, 80–81 (3d ed. 2020) [hereinafter *Policing for Profit*] (giving Georgia a "D-," tied for the lowest among all states except Massachusetts). At the same time, Georgia law enforcement has strong financial incentives to use civil forfeiture because law enforcement agencies get to keep up to 100% of the proceeds. *See id.* at 80; O.C.G.A. § 9-16-

19(f). These financial incentives have a perverse tendency to distort law enforcement priorities toward revenue generation that benefits their agencies and sometimes even individual officers, both in this state and across the country. *Policing for Profit* at 34, 80 (noting that forfeiture programs like Georgia's, "risk[] biasing law enforcement priorities toward the pursuit of property over justice"); Brian D. Kelly, Institute for Justice, *Fighting Crime or Raising Revenue: Testing Opposing Views of Forfeiture* 6 (2019) [hereinafter *Fighting Crime or Raising Revenue*] ("[W]eak protections for property owners coupled with law enforcement's financial incentive make the forfeiture tool ripe for systematic abuse."); Chris Joyner & Bill Rankin, *'Like a Slush Fund': Revenue Agents Bought Pricey Perks with Seized Assets*, Atl. J.-Const. (Mar. 12, 2020), ("For years, [the Office of Special Investigations at the Georgia Department of Revenue] has used millions of dollars from assets seized in criminal investigations to buy trinkets, travel, engraved firearms, tactical gear, a fleet of cars and personal items[.]"). Randy Travis, *Georgia Sheriff Assigns Himself $70,000 Performance Car Bought with Seized Drug Money*, FOX 5 Atl. (June 26, 2018), ("Police are allowed to spend that money on things that legitimately protect the public. And the Gwinnett County Sheriff's department insists a 2018 Dodge Charger Hellcat [driven by the Sheriff] does exactly that.").

From 2015 to 2018, Georgia law enforcement agencies received over $51 million in forfeiture revenue from forfeitures done solely under Georgia state law

and spent $37 million from their forfeiture funds. *See Policing for Profit* at 80–81. But these numbers are not indicative of a highly successful law enforcement program. "Most cases of civil asset forfeiture in Georgia are not targeting high-level, organized criminal activity as intended but are instead impacting low-income individuals who are rarely charged with any crime." U.S. Commission on Civil Rights, *Civil Asset Forfeiture and its Impact on Communities of Color in Georgia* 11 (2022) [hereinafter U.S. Commission Report]. Indeed, the median currency forfeiture in Georgia is just $540, meaning half are *below* that amount. *Policing for Profit* at 81. Moreover, there is little empirical evidence to suggest that forfeiture has any appreciable impact on "help[ing] law enforcement fight crime, either in terms of solving more crimes or reducing drug usage," outside of simply raising revenue for the department. *Fighting Crime or Raising Revenue* at 14–16.

As a result, there are grave doubts about whether civil forfeiture is employed neutrally and in the best interests of justice where law enforcement agencies stand to financially benefit from each civil forfeiture. *See Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1195 (D.N.M. 2018) (holding forfeiture scheme violates due process where "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"). These perverse financial incentives seem to have influenced abusive forfeiture behavior in Georgia, such as

in South Fulton, where police sold seized vehicles before any hearing ever occurred. *See* Justin Gray, *GA Police Legally Seized Cars Without Proving Wrongdoing in Court, Failed to Report to State*, WSB-TV (Feb. 13, 2023). Given these serious concerns, it is particularly important that Georgia's civil forfeiture statutes be strictly construed against the State, as Georgia's courts have repeatedly held, to effectively protect private property rights and uphold due process. *See, e.g.*, *Swan v. State*, 29 Ga. 616, 627 (1860) ("[W]e are to construe penal statutes, or such as work a forfeiture strictly[.]"); *State v. Williams*, 278 Ga. 447, 449 (2004) ("[I]t is well established that a forfeiture proceeding is a quasi-criminal proceeding, and that the forfeiture statute must be strictly construed against the State."); *Gen. Motors Acceptance Corp. v. State*, 279 Ga. 328, 331 (2005) ("[B]ecause forfeiture of property is disfavored, the statutory scheme must be 'strictly construed and limited.'" (quoting *Pabey v. State*, 262 Ga. App. 272, 277 (2003)).

ARGUMENT

This case concerns two of the few protections that *are* in place for property owners in Georgia civil forfeiture proceedings: the pleading requirements of O.C.G.A. § 9-16-12(a) and the guarantee of a timely hearing in O.C.G.A. § 9-16-12(f). The decision below eviscerated these protections by giving them a strained construction in favor of the State, contrary to the statute's text and purpose and without regard to the traditional rule that penal statutes are strictly construed against

the State. This Court should reverse the decision below and clarify that Georgia citizens will not be deprived of their property without two of the most important aspects of due process: adequate notice of the allegations and a timely hearing.

Part I sets forth the proper interpretation of these protections in § 9-16-12 based on the text, context, and legislative design of those provisions and consistent with the requirements of due process.

Section I.A explains that the phrase "essential elements of the criminal violation" in subsection (a) was intended to refer to and incorporate due process standards for indictment pleading, given the long history of courts in Georgia and in the federal system using "essential elements" as a term of art in that context. The Court of Appeals' holding that an essential element may be inferred from the allegations flies in the face of the black-letter rule that essential elements of a crime cannot be implied, but rather must be stated explicitly on the face of the complaint.

Section I.B explains that the identity of "the last claimant [] served with the complaint"—which starts the clock for subsection (f)'s 60-day window for a timely hearing—is determined at the moment "an answer is filed." The Court of Appeals committed a double error on this point, holding (1) that the 60-day window for any claimant's hearing does not begin until *all* claimants are served, and (2) that an answer filed by a claimant whom the State neglected to timely serve counts as constructive service, therefore making a claimant who was never served "the last

claimant [] served" for purposes of § 9-16-12(f). The rule advanced by the Court of Appeals is indeterminate, illogical, and inimical to the purposes of this subsection.

Part II explains the importance of the rule of strict construction in the context of forfeiture statutes, clarifies some misconceptions about this rule, often referred to as "the rule of lenity," and applies that canon to the case at bar.

Section II.A explains that strict construction serves as a compliment to the notice requirements of due process. More than just providing fair notice to citizens of what conduct is prohibited, lenity limits the scope of issues at trial, preventing the sort of "unfair surprise" that would result from a conviction on facts not alleged in an indictment. Since property owners are not guaranteed counsel in civil forfeiture proceedings, this concern is perhaps even more acute than in a criminal prosecution.

Section II.B explains how strict construction furthers the separation of powers, limiting imposition of a penalty to only the situations that were clearly intended by the people's representatives. This function is especially important for quasi-criminal proceedings like civil forfeiture, particularly where the incentives of public officials are often out of alignment with the interests of the public and where the other traditional safeguards of criminal punishment—the much higher burden of proof, the grand and petit juries, and the rights to counsel, confrontation, and compulsory process—are conspicuously absent.

Section II.C clarifies that strict construction applies not just to the substantive provisions of penal statutes, but also to their procedural aspects. Mindfulness of this canon might have prevented the Court of Appeals' errors in this case when interpreting any ambiguity in § 9-16-12(f). And as for § 9-16-12(a), since the phrase "essential elements" in is a crystal-clear reference to the pleading standards for indictments, the rule of strict construction simply provides extra confirmation.

The people of Georgia have few protections from a practice that "seems to violate that justice which should be the foundation of the due process of law required by the Constitution." *Grant Co. v. United States*, 254 U.S. 505, 510 (1921). Therefore, it is critical that those minimal protections the General Assembly has provided should be strictly construed against the state. As this Court once said, "[t]o protect the individual against encroachments upon his rights by greater power is one of the most sacred duties of courts." *Brown v. Jacobs Pharm. Co.*, 115 Ga. 429, 445 (1902). The Court of Appeals failed to uphold that duty. For the following reasons, the decision below should be reversed.

I. The Court of Appeals' decision misconstrues § 9-16-12 in a way that undermines its purpose of ensuring two essential components of due process of law: adequate notice and a timely hearing.

The Court of Appeals' decision ignores the text and undermines the purpose of Georgia's Uniform Civil Forfeiture Procedure Act (UCFPA), which clearly sets forth detailed pleading requirements and a 60-day hearing deadline. *See* O.C.G.A.

§ 9-16-12(a), (f). This Court should correct the erroneous interpretation of those protections in the decision below and firmly establish the protections the legislature intended property owners to have, which are fundamental guarantees of due process.

"There is scarcely a right more ancient than that great principle that usually insures the giving of notice of a charge against one, and with it an opportunity to be heard." *Walton v. Davis*, 188 Ga. 56, 63 (1939). As Justice Curtis wrote in *Murray's Lessee*, a case decided shortly before the framing and ratification of the Due Process Clause in the Georgia Constitution and the Fourteenth Amendment, "'due process of law' generally implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 280 (1855). But the right to a trial does not mean that the trial may be had whenever the prosecution so decides. That trial must occur "in the manner, and *within the time*, prescribed by the laws of the land." *Cf. McLean v. State*, 4 Ga. 335, 340 (1848) (discussing the due process implications of a statute of limitations).

Those fundamental tenets of due process were not respected here, but this Court need not decide this case on constitutional grounds. Reversal is warranted because the opinion below misconstrues the text, context, and purpose of § 9-16-12.

A. The use of the phrase "essential elements" in § 9-16-12(a) indicates that the General Assembly intended to tie the pleading standards for forfeiture complaints to the due process standards for indictments, and those standards were not met here.

The requirement of notice is one of the oldest and most foundational aspects of "due process of law." At the Founding, that phrase meant that a person's life, liberty, or property could only be taken pursuant to a warrant or *mittimus* founded upon an "indictment or presentment . . . [or] Writ original of the Common Law." Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 467 (2022) (quoting 2 Edward Coke, *Institutes of the Laws of England* 50 (London, W. Rawlins 6th ed. 1681). Accordingly, the notice requirements for a given proceeding would depend on what kind of original writ the proceeding was founded upon. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part) (noting that at common law, "civil writs," no less than criminal indictments, "risked being held defective if [they] didn't provide fair notice"). As the American legal system has moved away from the old common-law writ system, courts have re-interpreted "due process" to demand notice that is "reasonable and adequate for the purpose, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." 16B Am. Jur. 2d *Constitutional Law* § 976 (citing *Dohany v. Rogers*, 281 U.S. 362 (1930)).

At common law, the pleading standards for civil forfeiture were quite strict. The common-law analogue of the modern civil forfeiture action was a "libel of information in rem." *See Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 54 (1932). Historically, "[a] libel for forfeiture [was required to] be particular and certain in all the material circumstances which constitute the offence." *The Caroline*, 11 U.S. (7 Cranch) 496, 500 (1813). In this way, the notice requirements for a libel of information in rem were similar to those for an indictment. *Cf. Ex parte Vallandigham*, 28 F. Cas. 874, 891 (C.C.S.D. Ohio 1863) (explaining that a criminal defendant must have notice "of what crime he has been accused, and of the particular transaction, with time, place and material circumstances, which is supposed to constitute that crime"). Broadly speaking, the particularity requirements of notice serve "[t]o enable the accused to determine on the line of his defence, and prepare for it, both as to the law and facts." *Wingard v. State*, 13 Ga. 396, 400 (1853); *see also Ford v. Ford*, 270 Ga. 314, 315 (1998) (holding that due process requires notice sufficient "to adequately inform appellant of the charge against him so that he would have the opportunity to defend himself"); *United States v. Burr*, 25 F. Cas. 55, 170 (C.C.D. Va. 1807) (Marshall, C.J.) ("In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation and the circumstances which will be adduced against him.").

In line with traditional practice, the UCFPA requires a forfeiture complaint "allege the essential elements of the criminal violation which is claimed to exist." O.C.G.A. § 9-16-12(a). The General Assembly's choice of words plainly invokes the due process standard for indictments. *See Lizana v. State*, 287 Ga. 184, 185 (2010) ("[D]ue process of law requires that the indictment on which a defendant is convicted contain all the *essential elements* of the crime." (emphasis added) (quoting *Borders v. State,* 270 Ga. 804, 806 (1999)). Because Georgia courts traditionally presume that the legislature "enact[s] statutes with full knowledge of existing law, including court decisions," *Dove v. Dove*, 285 Ga. 647, 649 (2009), these words should be presumed to incorporate the "cluster of ideas" associated with that area of legal doctrine. *Morissette v. United States*, 342 U.S. 246, 263 (1952). "[A]s Justice Frankfurter colorfully put it, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

The Court of Appeals stated that there were two "essential elements" to the underlying criminal violation: "(1) an unlawful taking of the property of another (2) with the intent of depriving him of it." *Smith v. State*, 366 Ga. App. 815, 817 (2023) (quoting *Green v. State*, 223 Ga. App. 467, 468 (1996)). Despite acknowledging that "the second amended complaint d[id] not explicitly allege [the intent element]," § 9-

16-12(a) was nonetheless held to be satisfied because "the requisite intent can be inferred from the allegations of the complaint." *Id.* at 818.

Such an inference may afford sufficient notice to the defendant in an ordinary civil proceeding between two private parties, but it is clearly insufficient in a quasi-criminal proceeding such as civil forfeiture.[1] "[T]he essential elements of a crime cannot be implied in an indictment." *Walker v. United States*, 342 F.2d 22, 26–27 (5th Cir. 1965) (cited by *DeFrancis v. Manning*, 246 Ga. 307, 308 (1980); *see also United States v. Hess*, 124 U.S. 483, 486 (1888) ("No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital.") (cited by *Thomas v. State*, 366 Ga. App. 738, 740 (2023) "[T]he opportunity to guess at the factual and legal bases for a government action does not substitute for actual notice of the government's intentions." *Kashem v. Barr*, 941 F.3d 358, 382 (9th Cir. 2019) (quoting *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treas.*, 686 F.3d 965, 986–87 (9th Cir. 2012)). The Court of Appeals' decision on this point is thus inconsistent with criminal pleading jurisprudence.

Additionally, it makes sense for this rule to apply in civil forfeiture actions. Property owners often have no personal knowledge of the allegedly criminal conduct

[1] *Cf. Williams*, 278 Ga. at 449 (describing civil forfeiture as "quasi-criminal").

underlying a civil forfeiture. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 444–46 (1996) (a wife's interest in a car co-owned with her husband may be forfeited despite her lack of knowledge that he would use the car to engage in sexual activity with a prostitute); *see also Snitko v. United States*, 2021 WL 3139707, at *3 (C.D. Cal. June 22, 2021) (describing notices provided to property owners after mass seizure of safe-deposit boxes as "anemic" because they simply cited a panoply of statutory provisions and holding that such notices raised significant due process concerns). But even when the owners *do* have such knowledge, "without knowing the exact reasons for the seizure, as well as the particular statutory provisions and regulations they are accused of having violated, [property owners] may not be able to clear up simple misunderstandings or rebut erroneous inferences drawn by [law enforcement]." *Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997). "Moreover, ambiguous factual circumstances may in many cases cause [property] owners to guess incorrectly why their [property] has been seized, thus preventing them from responding effectively to the unspecified accusations of criminal wrongdoing that underlie a forfeiture." *Id.* at 1298. It cannot be lightly assumed that the General Assembly would intend such a result. Accordingly, this Court should correct the Court of Appeals' erroneous construction of § 9-16-12(a) and clarify that pleading requirements in civil forfeiture actions are the same as those in criminal indictments.

B. The text, context, and purpose of § 9-16-12(f) demonstrate that the identity of "the last claimant [to be] served with the complaint" is fixed at the time "an answer is filed."

O.C.G.A. § 9-16-12(f) provides that "[i]f an answer is filed, a bench trial shall be held within 60 days after the last claimant was served with the complaint; provided, however, that such trial may be continued by the court for good cause shown." The plain text and grammatical syntax of that provision indicates that "the last claimant" refers to the claimant who was served last *prior to* the filing of an answer. An answer to the complaint in this case was filed on December 31, 2021. *Smith*, 366 Ga. App. at 819. At that time, the last claimant was served on December 6, 2021, making the deadline for trial or a continuance February 4, 2022. *Id.* Neither a trial nor a continuance was had within that timeframe. *Id.* at 820 n.2. Accordingly, the complaint should have been dismissed. *See Goodwin v. State*, 321 Ga. App. 548, 549 (2013) ("The result of a failure to conduct a hearing within 60 days, or to obtain a good-cause continuance, is a dismissal of the State's complaint.").[2]

[2] Georgia courts have often held that "mandatory" time-limits prescribed by statute like O.C.G.A. § 9-16-12(f) are "jurisdictional," and thus courts may not simply forgive a failure to follow them. *See, e.g.*, *Fullwood v. Sivley*, 271 Ga. 248 (1999) (failure to file timely notice of appeal in habeas case is jurisdictional); *Brassfield & Gorrie v. Ogletree*, 241 Ga. App. 56 (1999) (superior court's failure to enter an order in a workers' compensation case within the 20-day statutory timeframe is jurisdictional); *Yeomans v. Williams*, 117 Ga. 800, 803 (1903) ("Notice and the lapse of time are both jurisdictional facts."); *see also Rounsaville v. State*, 345 Ga. App. 899, 901 (2018) ("§ 9-16-13(f)'s] 60-day requirement is mandatory, not permissive, because the purpose of the statute is to 'ensure a speedy resolution of contested

The Court of Appeals failed to correctly interpret this provision. The claimants' answer identified SmithCo Transfer, LLC as an additional claimant, whom the state subsequently moved to join as a necessary party. SmithCo Transfer was never properly served, but it nevertheless filed an answer on January 21, 2022. The Court of Appeals erroneously treated that date as the time when "the last claimant was served," reasoning that "[b]ecause SmithCo Transfer filed an answer without raising the defense of insufficient service," its filing of an answer was "the equivalent" of being served with the complaint. *Smith*, 366 Ga. App. at 819. This construction is illogical, contrary to the plain text of § 9-16-12(f), and liable to be exploited to the prejudice of rightful property owners.

First, the rule put forth by the Court of Appeals makes little sense—it leaves the deadline for the trial uncertain at the time the answer is filed. By contrast, a rule that "the last claimant" is determined at the time an answer is filed is simple, clear, and determinate—both the parties and the court will know the precise deadline for when a trial must be held or a continuance obtained for any claimant who has already been served. To wit, § 9-16-12(f) clearly presupposes that "the last claimant" has already been served. If the decision below was correct, then there would be hardly any reason for the legislature to include the phrase "[i]f an answer is filed" in the

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forfeiture cases in the courts, as well as a speedy resolution of property rights.'" (quoting *State v. Henderson*, 263 Ga. 508, 511 (1993))).

statute. If the General Assembly intended this result, it could have simply said "a bench trial shall be held within 60 days after *all* claimants have been served."

Second, the rule put forth by the Court of Appeals contravenes the text of the statute. SmithCo Transfer was never served with the complaint; it therefore *cannot* be "the last claimant served." In reaching its conclusion, the Court of Appeals employed the legal fiction that "the time the appearance is made is the equivalent of the time service of process is made in a normal case." *Smith*, 366 Ga. App. at 819 (quoting *McDowell v. State*, 290 Ga. App. 538, 540 (2008)). This was erroneous for two reasons. First, it wrenched the fiction from the context in which it was originally employed: the claimant in *McDowell* "filed an answer before service could be effected," and therefore use of the fiction was proper, since there otherwise would have been no starting point from which the trial deadline could be determined. *McDowell*, 290 Ga. App. at 540. Second, the Court of Appeals broke the cardinal rule of legal fictions: "no fiction shall extend to work an injury." 3 William Blackstone, *Commentaries* *43. The *McDowell* court employed this fiction to defeat the State's argument that "the 60-day period never began to run" and therefore a hearing held nearly *six months* after the claimant filed his answer did not violate § 9-16-12(f). 290 Ga. App. at 539–40. By contrast, the court below used this fiction to the *benefit* of the State, which had neglected to timely serve SmithCo Transfer, and

to the *detriment* of the claimants, including SmithCo Transfer.[3] *Cf. Turner v. State*, 234 Ga. App. 878, 878 (1998) (noting that the 60-day time clock "is a requirement for the benefit and protection of the property owners"). In the quasi-criminal context of civil forfeiture, the State should not benefit from legal fictions that would allow it to ignore or extend statutory deadlines.

Finally, the rule put forth by the court below countenances sandbagging by the State, allowing it additional time before trial without having to show cause. Under the holding of the Court of Appeals, whenever there are multiple claimants, the state can extend the deadline for trial by intentionally neglecting to serve one of the claimants on time. Such a result is clearly contrary to legislative design—a lack of diligence on the part of the State is most certainly not "good cause." Moreover, this rule furthers the harm caused by an illegitimate forfeiture. Often times, the property seized in a forfeiture action is vital to the daily life of the owner. *See, e.g.*, *Ingram v. Wayne County*, 81 F.4th 603, 628 (6th Cir. 2023) (Thapar, J., concurring) ("Cars are central to the way we live. . . . Indeed, for many people Wayne County

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[3] *McDowell* can also be viewed as an application of principles of equity, specifically the maxim "[e]quity regards as done that which ought to be done." *Cf.* Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050, 1120–21 (2021) (discussing this maxim). As Blackstone noted, the use of legal fictions is closely intertwined with the traditional practice of equity. *See* 3 Blackstone, *supra*, at *43 ("*In fictione juris, semper subsistit aequitas*." (In a fiction of law, equity always subsists.)). Here, the balance of the equities does not favor the use of a fiction. *Cf.* Smith, *supra*, at 1128 (discussing the maxim "[e]quity aids the vigilant and diligent").

seizes cars from, it's their only way of transportation."); Decl. of Joseph Ruiz ¶ 11, *Snitko v. United States*, No. 2:21-CV-04405 (C.D. Cal. June 3, 2021), ECF. No. 26-6 ("I desperately need to have my money returned to me. I am currently unemployed, and I had been living off the funds in my USPV box prior to the seizure. The loss of access to my money means I do not have money that I need to pay for food and medical care."). While a forfeiture hearing is pending, the property owner ordinarily is "entirely deprived of the use of the property." *United States v. $8,850 in U.S. Currency*, 461 U.S. 555, 564 (1983); *see also Snitko v. United States*, 2021 WL 3139706, at *5 (C.D. Cal. July 23, 2021) ("To date, 106 days after Ruiz asked the FBI for his property back, the Government has neither returned the $57,000 nor provided an adequate justification for the prolonged seizure."). That is because Georgia requires no preliminary hearing that enables a property owner to challenge probable cause for the seizure, despite several appellate courts holding that such a hearing is constitutionally required to be held promptly after a property seizure.[4] Thus, the burdens imposed on rightful property owners are already onerous, and the

[4] *See, e.g.*, *Ingram*, 81 F.4th at 621–22; *Krimstock v. Kelly*, 306 F.3d 40, 68–69 (2d Cir. 2002; *Prop. Clerk v. Harris*, 878 N.E.2d 1004, 1005 (N.Y. 2007); *Smith v. City of Chicago*, 524 F.3d 834, 838 (7th Cir. 2008), *vacated as moot sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009); *see also Culley v. Marshall*, 143 S. Ct. 1746 (2023) (granting certiorari on two cases presenting this issue). Prompt preliminary post-seizure hearings alongside strict construction of the statute at issue in this case would go a long way toward preventing abuses like those in South Fulton. *See* Gray, *supra*.

State does not need the deck stacked any further in its favor to pursue its legitimate interests. Accordingly, this Court should find that the simple, clear, determinate rule suggested by the plain text is the correct interpretation of the statute.

II. It is a fundamental maxim of Anglo-American jurisprudence that penal statutes—both civil and criminal—are to be strictly construed.

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). "This declaration of Chief Justice Marshall, reaching back across the centuries since Runnymeade, stands unchanged through the years since it was made and is undiminished in the respect and observance afforded it by English speaking judges wherever they sit." *Lovett v. State*, 111 Ga. App. 295, 295 (1965).

Modern lawyers typically associate what is now known as "the rule of lenity" with the construction of criminal statutes, but the principle of strict construction applied to *all* penal statutes, whether civil or criminal. *See, e.g.*, *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462–63 (1833) (forfeiture case) ("The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly."); *see also Wooden v. United States*, 595 U.S. 360, 388, 396 & n.5 (2022) (Gorsuch, J., concurring) ("The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" (quoting *The Adventure*, 1 F. Cas. 202, 204 (C.C. Va. 1812) (Marshall, C.J.) (forfeiture case)). Whether asset forfeiture

proceedings such as the one at issue here are best conceived as civil, quasi-criminal, or just simply criminal in nature, there can be little doubt that they are *penal*. *See Leonard v. Texas*, 137 S. Ct. 847, 847 (2017) (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."); *The Emily*, 22 U.S. (9 Wheat.) 381, 389 (1824) ("[I]t is the preparation of the vessel, and the purpose for which she is to be employed, that constitute the offence, and draws after it *the penalty of forfeiture*." (emphasis added)); *see also Roby v. Newton*, 121 Ga. 679, 682 (1905) ("Statutes providing forfeitures . . . are penal in their nature, and must be construed strictly against the persons claiming the forfeitures[.]"). The canon therefore applies with full force to both the criminal statutes supporting this forfeiture action as well as the civil forfeiture statute itself. Indeed, it has long been the practice of the courts of this state to give forfeiture statutes a strict construction. *See, e.g.*, *Swan*, 29 Ga. at 627 ("[W]e are to construe penal statutes, or such as work a forfeiture strictly[.]"); *Cisco v. State*, 285 Ga. 656, 663 (2009) ("Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." (quoting *United States v. One 1936 Model Ford V-8 De Luxe Coach,* 307 U.S. 219, 226 (1939))).

This rule of strict construction is more than just a reflection of "the tenderness of the law for the rights of individuals." *Wiltberger*, 18 U.S. at 95. Rather, it plays a vital structural role in the administration of justice, reinforcing the notice

requirements of due process and preserving the separation of powers between the legislative, executive, and judicial branches. *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Those functions are particularly important in forfeiture cases, where property owners often lack personal knowledge of the conduct underlying the seizure and incentives of government officials frequently are misaligned with the interests of the public. *See* Introduction *supra*. This Court should reiterate the importance of this venerable canon of construction in order to minimize abuses of civil forfeiture, particularly given the lack of other safeguards for the public interest.

A. The notice justification for the strict construction of penal statutes is no less applicable to forfeiture than it is to criminal punishment.

The strict construction of penal statutes works alongside the pleading specificity requirements of due process to provide fair notice to defendants. To be clear, "lenity's emphasis on fair notice isn't about indulging a fantasy [that ordinary people spend their leisure time reading statutes]." *Wooden*, 595 U.S. at 390 (Gorsuch, J., concurring). More than merely providing "fair warning" of what conduct is forbidden by the law, *cf. Banta v. State*, 281 Ga. 615, 617 (2007), lenity is also about limiting the scope of argument at trial. *Cf. Burr*, 25 F. Cas. at 170 ("The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him."). In this way, strict construction of the substantive conduct prohibited prevents the same sort of "unfair surprise" that would result from "permit[ting] the prosecution to prove that a crime

was committed in a wholly different manner than that specifically alleged in the indictment." *Walker v. State*, 146 Ga. App. 237, 245 (1978) (citing *DePalma v. State*, 225 Ga. 465, 469 (1969)). This canon of construction ensures that a defendant can prepare her defense based on the plain language of the statute, rather than having to worry about the judiciary placing upon it an "equitable construction." *Cf. Backus v. Gould*, 48 U.S. (7 How.) 798, 803 (1849) (explaining that "equitable construction, [i.e.,] making [a statute] extend to a case clearly beyond its terms, [] is a mode of construction altogether inadmissible in the case of a penal statute").

Fair notice is perhaps even more important in civil forfeiture proceedings than in criminal adjudication. For one thing, forfeiture claimants do not enjoy the burden-of-proof protections afforded criminal defendants—the state need only establish by a preponderance of the evidence that the property is connected to a crime. "This makes it easy for the government to win civil forfeiture cases and very difficult for property owners to fight back." *Policing for Profit* at 39. Prosecutors in forfeiture cases need not have the element of surprise *and* a lower burden of proof on top of their already substantial advantages in resources compared to the ordinary citizen. *Cf. Cobb v. State*, 246 Ga. 619, 619 (1980) ("[T]he strictest scrutiny is appropriate . . . when there is reason to believe that the prosecutor is using the superior resources of the State to harass or achieve a tactical advantage over the accused." (quoting *Arizona v. Washington*, 434 U.S. 497, 508 (1978))).

For another, unlike criminal defendants, who are entitled to the assistance of counsel even when they cannot afford it, *see Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), less-resourced forfeiture claimants are often on their own. *See* U.S. Commission Report at 17 ("[U]nless [the property owner] already has an attorney or knows an attorney it is unlikely they will be represented."). Even for those who *can* afford counsel, it is often not worth it—"[f]rom 2015 to 2018, half of Georgia's currency forfeitures were worth less than $540." *Policing for Profit* at 81. "Considering the cost of contesting a simple state forfeiture case is estimated at approximately $3,000, it is most often impractical financially to hire an attorney." U.S. Commission Report at 17. As a result, property owners frequently default for reasons unrelated to the merits of their case, such as financial infeasibility or inability to find counsel or adequately represent themselves. *Policing for Profit* at 30. It is one thing to expect a seasoned criminal defense lawyer to anticipate the various plausible constructions of a statute and make arguments against them; it is completely unreasonable to expect that of ordinary citizens. This Court should clarify that strict construction of forfeiture statutes is no less important to the fair notice requirement of due process than detailed and specific allegations.

B. Separation-of-powers concerns undergirding strict construction are even more acute in civil forfeiture actions than in criminal proceedings.

One of the most distinctive features of the American system of governance is the tripartite separation of powers. The framers of this state's first constitution considered the principle so foundational that, among all the "rules and regulations . . . for the future government of th[e] State," they decided to list it first: "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Ga. Const. of 1777, art. I, *as amended*, Ga. Const. art. I, § II, para. III.

It is a well-known adage that the strict construction of penal statutes "helps keep the power of punishment firmly 'in the legislative, not in the judicial department.'" *Wooden*, 595 U.S. at 391 (Gorsuch, J., concurring) (quoting *Wiltberger*, 18 U.S. at 95). But it also serves to restrict the power of prosecutors by means of the indictment sufficiency requirement and, where applicable, the possibility of preliminarily testing the strength of the State's case in a prompt, post-seizure retention hearing. *See* note 4 *supra.* Strict construction serves a preference-eliciting function, "plac[ing] the weight of inertia upon the party that can best induce [the legislature] to speak more clearly" and ensuring that the power of punishment is only utilized consistent with the will of the people (as expressed through their representatives). *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.).

This function is certainly of no small importance when personal liberty is at stake, but it is also of paramount importance when it comes to civil forfeiture. In traditional criminal punishment, this was one of the functions of the grand and petit juries, which historically served as safeguards of the people against unjust and unwise prosecutions. *See* Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 Wm. & Mary L. Rev. 1195, 1197–1214 (2014) ("Most eighteenth-century commentators agreed that [the jury system] was established as a necessary counter to governmental authority, including the executive, the legislature, and the judiciary."). Neither of those protections are part of Georgia's civil forfeiture process. *See* O.C.G.A. § 9-16-12(a), (f); *see also Swails v. State*, 263 Ga. 276, 278 (1993) (holding that Ga. Const. art. I, § I, para. XI(a) does not guarantee trial by jury in "drug forfeiture proceedings"). Moreover, unlike with civil forfeiture, there is a lower likelihood that a criminal prosecution will be contrary to the public interest, because state officials rarely have a financial interest in a defendant being sentenced to prison. By contrast, civil forfeiture presents perverse financial incentives that make it prone to abuse. *See* Introduction *supra*. Strict construction of forfeiture statutes cannot eliminate all abuses, but it will help prevent the most unwarranted.

C. The rule of strict construction applies to the procedural aspects of penal statutes no less than it does to their substance.

This Court has often held that "a penal statute must always be interpreted strictly against the State and in favor of [life,] liberty[, and property]." *Glover v. State*, 272 Ga. 639, 641 (2000); *Williams*, 278 Ga. at 449. Although this canon most typically arises in the construction of the substantive provisions of penal statutes, it applies with no less force to the construction of procedural provisions specific to criminal punishment and quasi-criminal proceedings such as civil forfeiture cases.

This Court's decision in *Williams* is illustrative. Following the initiation of forfeiture proceedings against her car under the former O.C.G.A. § 16-13-49(n), Ms. Williams filed "a timely but deficient claim of ownership." 278 Ga. at 447. After the filing deadline passed, "Williams attempted to amend her original claim of ownership to cure the deficiencies, but the trial court denied the amendment and declared that all right, title, and interest in the automobile was forfeited to the State." *Id.* at 447–48. On appeal, the state argued that the relation back provision of O.C.G.A. § 9-11-15 did not apply to subsection (n) because that provision "entails only an 'administrative' process," rather than "a judicial process." *Id.* at 448.

Applying the rule of strict construction, this Court held that the relation back provision of the Civil Practice Act applies to administrative proceedings under subsection (n) no less than it does to the judicial proceedings under subsections (o) and (p), even though no part of the statute's text expressly indicated that it should.

Id. at 449. As relating back is clearly a matter of pure procedure, it is clear that the strict construction of penal statutes extends to their procedural aspects no less than to their substantive provisions. *See also Swan*, 29 Ga. at 627 (holding that where a penal statute specifies a remedy, the Court will not infer that other remedies for enforcement are available because of the canon of strict construction); *Morrow v. State*, 186 Ga. App. 615, 615–16 (1988) (holding that where "the detailed statutory scheme" specifies that the seizure of property be effected pursuant to process issued by a court of competent jurisdiction, failure to seize the property in that manner warrants reversal of summary judgment in the forfeiture proceeding because such statutes "must be strictly construed and strictly adhered to"); *Weaver v. State*, 299 Ga. App. 718, 721–22 (2009) (noting that this canon applies to construction of the notice provisions in forfeiture statutes).

Not only is application of this canon consistent with precedent, but it is also justified as a practical matter. Rules of procedure can be just as outcome-determinative as rules of substance. *See Hanna v. Plumer*, 380 U.S. 460, 468–69 (1965). In too many forfeiture cases, harsh application of procedural rules has served to wrongfully deprive a citizen of her property. *See, e.g.*, Complaint ¶¶ 49–73, *Martin v. FBI*, No. 1:23-CV-00618 (D.D.C. filed Mar 7, 2023) (describing how the FBI's notice of seizure offered two ways to respond—filing a petition (asking for the property's return "as a matter of administrative grace") or filing a claim (forcing

the government to either return the property or initiate judicial proceedings)—but described those options "in confusing language," prompting an innocent claimant to file a petition, which after two years still has yet to be resolved). Many forfeiture claimants, especially those without assistance of counsel, will be unfamiliar with the typical conventions of procedure. "That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). By contrast, the strict construction of penal procedures is hardly prejudicial to the interests of the State, particularly when considered over the long term. The State's attorneys, unlike the typical forfeiture claimant, are repeat players in this game. Application of this canon may result in the State losing an individual case, but applicable precedent makes it highly foreseeable that Georgia courts will interpret procedural penal statutes strictly, and the State is well positioned to anticipate and guard against procedural errors. Moreover, systematic application of this canon to procedural matters will induce prosecutors to err on the side of diligence even without an authoritative interpretation. And as with the substantive scope of the penal law, when a strict construction of penal procedure is contrary to the public interest, the State is best positioned to ask the General Assembly to amend the law. *See* Section II.B *supra*.

To the extent that the Court perceives ambiguity in § 9-16-12(f)'s 60-day time limit, this canon offers resolution. Although we maintain that the interpretation

advanced *supra*, Section I.B, is the correct reading of the statute, applying the rule of lenity helps resolve any reasonable disagreements about the clarity or meaning of § 9-16-12(f). *See Coates v. State*, 304 Ga. 329, 332 n.4 (2018) (the rule of lenity applies when "reasonable minds disagree[]" about whether a statute is ambiguous). In such circumstances, the canon of strict construction provides clear guidance to the courts, who would otherwise have to rest their decision on the basis of "some conjectural policy, not avowed on the fact of the statute." *United States v. Open Boat*, 27 F. Cas. 354, 357 (C.C.D. Me. 1829) (Story, J.). Moreover, a robust canon of strict construction resolves any indeterminacies *ex ante*, reducing the risk of any "surprise" to the parties. Finally, strict construction of § 9-16-12(f) would reduce the opportunity for prosecutorial sandbagging, the potential for which has been clearly demonstrated by cases like *McDowell*. *See* Section I.B *supra*. "It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 61 n.13 (1984) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). This Court should reaffirm the traditional rule that the State must turn square corners when it pursues forfeiture of private property.

Because the meaning of § 9-16-12(a) is so clear, this canon may have less bearing on the question presented regarding the pleading requirements of that

section. As discussed in Section I.A *supra*, text, history, and context demonstrate that the phrase "essential elements of the criminal violation" is best read to incorporate the requirements of pleading for indictments, and as courts have long held, all essential elements must be explicitly stated and are not to be inferred by the court. With regard to this provision, the rule of lenity is simply "extra icing on a cake already frosted." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)).

* * *

When the General Assembly provides procedural protections in a penal statute, those protections should be construed in favor of the rights of the citizen. Section 9-16-12(a) requires the "essential elements" of a crime to be clearly and expressly stated on the face of the complaint, not left to implication. Section 9-16-12(f) requires a hearing to be held within sixty days of the last claimant being served with the complaint prior to an answer being filed. Neither of those requirements were complied with here. The appellants, therefore, are entitled to dismissal.

CONCLUSION

For the foregoing reasons, as well as those stated in the Appellants' Brief, the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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I hereby certify that on October 20, 2023, I served a copy of the foregoing *Brief of Amicus Curiae Institute for Justice in Support of Appellants* via email, per prior agreement of the parties, upon all the following counsel of record:

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