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Supreme Court examines civil asset forfeiture and due process in *Culley*

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The United States Supreme Court heard oral arguments last week in *Culley v. Marshall*, a case that could have life-changing consequences for millions of Americans who happen to find themselves entangled in the criminal justice system.

The case concerns civil asset forfeiture – a process that permits the government to seize, and then keep or sell, property it alleges is connected to a crime, sometimes even when the owner of the property was not involved in the alleged crime or convicted of an offense.

The practice of civil forfeiture has come under increasing scrutiny recently, from both ends of the political spectrum. While advocates say that it deprives criminals of the fruits and instrumentalities of crime, critics point out that law enforcement often abuses civil forfeiture to generate revenue and its expensive and time-consuming procedures can deprive innocent owners of essential property they need to conduct their lives (*e.g.*, a car).

Culley presents a narrow procedural issue about the process that is due in civil forfeiture proceedings. However, practitioners should keep an eye on the case because it has the potential to make it easier for individuals across the country, in particular, so-called "innocent owners," to recover property that is seized by the government. The case has also cast a light on what critics see as the flaws in the civil forfeiture system.

Background

In *Culley*, the Supreme Court will decide which test should be used to determine what process is due after property is seized by law enforcement in anticipation of civil forfeiture.

The two petitioners are "innocent owners" of cars that were seized incident to arrest. Petitioner Halima Culley's car was being used by her son and was seized in February 2019, after he was pulled over and

police found marijuana in the vehicle. Forfeiture proceedings commenced promptly, but Culley didn't get her car back until 20 months later, after she obtained summary judgment on her innocent owner defense.

Petitioner Lena Sutton's car was likewise seized in February 2019 after a friend borrowed it and was pulled over with drugs in the vehicle. Forfeiture proceedings started quickly but Sutton didn't get her car back until fifteen months later, when the court ruled that Sutton, too, was an innocent owner.

Culley and Sutton filed separate federal lawsuits alleging the State violated their due process rights by retaining their cars without providing them with an interim "retention hearing" that would enable them to argue early on that they were innocent owners of the seized vehicles. The federal trial courts applied the Supreme Court's four-part test from *Barker v. Wingo* for determining whether a criminal defendant's speedy trial right has been denied, which the Supreme Court had applied to assess the timeliness of a forfeiture proceeding in *United States v.* $8,850. The trial courts ruled against the Petitioners, finding the State had timely initiated forfeiture proceedings and that any delay was due to the Petitioners' lack of diligence in pursuing their rights in those proceedings. The Eleventh Circuit affirmed, holding no interim "retention hearing" was required because, under the Supreme Court's decision in *United States v. Von Neumann*, due process requires only a timely final hearing on the merits of the forfeiture action.

In the Supreme Court, the Petitioners argued that the appropriate test is not *Barker* but the familiar three-part balancing test from *Mathews v. Eldridge*, which is used in civil proceedings to determine whether the Due Process Clause requires additional process. Citing "the avalanche of precedent applying *Mathews* in civil cases involving requests for more process" and relying on *Krimstock v. Kelly*, a 2002 Second Circuit opinion by then-Judge Sotomayor holding that *Mathews* and not *Barker* applies in this context, Petitioners argued that *Mathews* should apply because they are seeking additional process (a hearing to avoid a temporary deprivation) rather than more timely process, *i.e.*, less time to a final forfeiture disposition.

Respondents and the United States as amicus curiae argue, consistent with the Eleventh Circuit's opinion, that because a timely final hearing on the merits of the forfeiture action is all due process requires, the *Barker* test for timeliness is the appropriate test. They further insist that, even if *Mathews* did apply, no interim, post-seizure hearing is required because the court overseeing a forfeiture action can handle on a case-by-case basis any interim requests for relief, including by expediting proceedings.

Oral Argument

At the oral argument, several Justices appeared to take sides on whether *Von Neumann* and $8,850 foreclosed Petitioners' request for a "retention hearing" and whether *Barker* or *Mathews* is the appropriate test, but no obvious majority emerged for a resolution. Notably, the dissensus appeared to be driven, in part, by a recognition of the abuses endemic to the civil forfeiture process, and the attendant need for litigants to have a mechanism to challenge such abuses, even if *Barker* both governed and resolved the retention-hearing issue at hand.

Justice Sotomayor, for instance, made clear that there are "documented" "abuses of the forfeiture system" that are driven by "the incentives that police are given to seize property to keep its value," rather than any legitimate purpose. Justice Gorsuch noted that "some jurisdictions[] are using civil forfeiture as [a] funding mechanism[]" and, analogizing to "kangaroo courts," raised concerns about draconian state-law procedures designed to stymie the recovery of seized property. Justices Kagan and Jackson appeared sympathetic to these criticisms, and seemed open to Justice Gorsuch's professed interest in a

narrow ruling that would preserve the ability to raise due process challenges to abuses of the forfeiture process.

If the Court were to select *Mathews* as the governing framework for analyzing due process challenges in this context and adopt the Petitioners' view that a due process interest in retaining your property pending a final forfeiture decision necessitates an interim retention hearing, the impact on participants in civil forfeiture processes spanning the country would be significant. In thousands of proceedings, property owners would have an early opportunity to avoid the potentially life-altering deprivation of their belongings, such as the loss of a car, which can jeopardize one's ability to make a living. Several Justices seemed interested in finding a way to help litigants grapple with the byzantine forfeiture process. We'll know soon enough if they believe *Culley* is the right vehicle for addressing the issue.