NO. 22-_____

In the Supreme Court of the United States

HALIMA TARIFFA CULLEY, on Behalf of Herself and Those Similarly Situated, *Petitioner*,

v.

ATTORNEY GENERAL OF ALABAMA ET AL., *Respondents.*

LENA SUTTON, on Behalf of Herself and Those Similarly Situated as Described Below, *Petitioner,*

v.

TOWN OF LEESBURG, ALABAMA ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit

No. 21-13805

Halima Tariffa Culley, on Behalf of Herself and Those Similarly Situated, *Plaintiff-Appellant*, v. Attorney General, State of Alabama, District Attorney of the 13th Judicial Circuit (Mobile County), City of Satsuma, Alabama, *Defendants-Appellees.*

Lena Sutton, on Behalf of Herself and Those Similarly Situated as Described Below, *Plaintiff-Appellant,* v. Leesburg, Alabama, Town of, *Defendant-Appellee,* state of Alabama, *Intervenor-Appellee.*

Date of Final Opinion: July 11, 2022

Date of Rehearing Denial: August 30, 2022

U.S. District Court, Southern District of Alabama

Civ. Act. No. 1:19-cv-701-TFM-MU

Halima Tariffa Culley, *Plaintiff*, v. Steve Marshall, in His Official Capacity as Attorney General of the State of Alabama, et al., *Defendants.*

Date of Final Order: September 29, 2021

U.S. District Court, Northern District of Alabama

No. 4:20-cv-00091-ACA

Lena Sutton, on Behalf of Herself and Those Similarly Situated, *Plaintiff,* v. Leesburg, Alabama, Et Al., *Defendants.*

Date of Final Order: September 13, 2021

LIST OF PARTIES

Petitioners and Plaintiffs-Appellants Below

- Halima Tariffa Culley, on Behalf of Herself and Those Similarly Situated
- Lena Sutton, on Behalf of Herself and Those Similarly Situated as Described Below

Respondents and Defendants-Appellees Below

- Alabama Attorney General
- District Attorney of the 13th Judicial Circuit (Mobile County)
- City of Satsuma, Alabama
- Town of Leesburg, Alabama

Respondent and Intervenor-Appellee Below

- State of Alabama

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Lena Sutton and Halima Culley, by and through undersigned counsel in this consolidated appeal[1] respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's Opinion affirming the judgments of the District Courts in *Sutton v. Town of Leesburg, Alabama*; and *Culley v. City of Satsuma, et al.*, is included in the Appendix ("App.") at 1a. The District Court's Order in *Sutton v. Town of Leesburg, Alabama, et al.*, Case No. 4:20-CV-00091-ACA, in the United States District Court for the Northern District

[1] The Eleventh Circuit Court of Appeals opinion arises out of two cases, *Sutton v. Town of Leesburg, Alabama, et al.*, Case No. 4:20-CV-00091-ACA in the United States District Court for the Northern District of Alabama, and *Culley v. Attorney General, State of Alabama et. al.*, Case No. 1:19-CV-00701 TFM-MV, in the United States District Court for the Southern District of Alabama. A Motion for Summary Judgment was granted in favor of the defendants in the *Sutton* case, and a Motion to Dismiss in favor of the defendants was granted in the *Culley* case. Two separate appeals were taken in the Eleventh Circuit Court of Appeals, No. 21-13484-GG (*Sutton*); and Appeal No. 21-13805-AA (*Culley*). Because the legal issues and facts were and are similar, if not identical on the legal issues side, the cases were consolidated for appeal pursuant to FRAP 3(b)(2) by the Eleventh Circuit on January 11, 2022. The Eleventh Circuit opinion appealed from decided to both consolidated appeals.

of Alabama, is included at App.60a. The District Court's Order in *Culley v. Attorney General, State of Alabama, et al.*, Case No. 1:19-CV-00701 TFM-MU, in the United States District Court for the Southern District of Alabama, is included at App.10a. These opinions were not designated for publication.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court opinions on July 11, 2022. App.1a. Petitioners timely filed a Petition for Panel Rehearing or Rehearing En Banc on July 25, 2022. The Petition for Panel Rehearing or Petition En Banc was denied by the Eleventh Circuit Court of Appeals on August 30, 2022. App.74a. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) and file within the time required, as extended by this Court's Order of November 16, 2022, S. Ct. R. 13.5, Sup. Ct. No. 22A428, from the date Petitioners' Petition for Panel Rehearing or En Banc Review was denied.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Summary of Law

This case arises out of the particular due process question of what process is due *pendente lite*, when one has property seized pursuant to a civil asset forfeiture statute. These are people who, in many cases such as the plaintiffs[2] in this case, have not even been charged with a crime, not to mention convicted, and yet are deprived of their property with no process other than the successful defense of a civil action brought against them by a governmental entity.

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[2] The Petitioners hereafter will be referred to as "Plaintiffs".

There is a clear split amongst the circuits as to what test should apply. The Eleventh Circuit has held that the speedy trial test under *Barker v. Wingo*., 407 U.S. 514 (1972), controls the analysis, and that due process is provided by the civil asset forfeiture proceeding itself. However, even the Eleventh Circuit recognizes that "virtually every other circuit to address the issue" has found that the issue is properly analyzed according to the factors articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), *U.S. v. Kaley*, 579 F.3d 1246, 1260 (11th Cir. 1990), and that those whose property has been seized are "entitled to a pretrial hearing to determine whether it is likely that the restrained assets will be subject to forfeiture." *Id.*

Foremost amongst those authorities holding that due process requires a probable cause hearing to determine the contours of pretrial deprivation is *Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002), authored by then judge, now Justice, Sotomayor. She stated in that case that due process "requires that claimants be given an early opportunity to test the probable validity of further deprivation . . . and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the government." *Krimstock*, 306 F.2d at 68.

This Court has already found this due process issue of sufficient gravity that a petition to review the question be granted. The Court in *Alvarez v. Smith*, 555 U.S. 1169 (2009) granted certiorari to review the Seventh Circuit's Opinion, reversing the district court in the case, as well as existing Seventh Circuit precedent, in *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), that the *Mathews* test controlled, as opposed to *Barker*, and owners of seized vehicles are entitled

under the Due Process Clause to " a mechanism to test the validity of the retention of the property." *Smith*, 524 F.3d at 838. This Court never reached the question on the merits, however, because, in an action seeking only declaratory and injunctive relief, the cash and property made the subject of the action had been retuned thus negating the standing requirement of a live controversy. *Alvarez*, 558 U.S. at 92. This case does not suffer the same infirmity, as the Eleventh Circuit specifically considered the issue and stated that a "live controversy" remains as to the claims for monetary damages. App.6a.

The Eleventh Circuit itself recognizes that it is the only circuit holding that the civil asset forfeiture proceeding itself ratifies due process as to the pretrial restraint of assets, recognizing contrary authority from the Fifth, Tenth, Seventh, Fourth, Ninth, Eighth, and Third Circuits. *United States v. Register*, 182 F.3d 820, 834 (11th Cir. 1999). This Court can and should now reach the issue the *Alvarez* Court sought to reach, and bring some uniformity to this due process question.

B. Background of the Cases

This case arises out of the seizure and retention of Plaintiffs' vehicles pursuant to Ala. Code § 20-2-93 (1975).[3] In neither case were Plaintiffs/owners of the

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[3] The particular judicial forfeiture statute at issue in these consolidated cases is Ala. Code 20-2-93. The Alabama Code was amended on May 25, 2021, effective January 1, 2022. 2021 Ala. Acts 497. Of course, "statutes are to be prospective only, unless clearly indicated by the legislature. Retrospective legislation is not favored by the courts, and statutes will not be construed as retrospective unless the language used in the enactment of the statute is so clear that there is no other possible construction." *Riley v. Kennedy*, 928 So. 2d 1013, 1016 (Ala. 2005). No such

vehicles present during the seizure; and in neither case were they ever charged with a crime. Instead, they were made defendants in cases brought by the State of Alabama under Alabama's Civil Asset Forfeiture ("CAF") statute. Ala. Code § 20-2-93. In both underlying CAF cases in the Alabama State Courts, the plaintiffs were able to prevail on summary judgment by asserting the innocent owner defense available under the statute. Ala. Code § 20-2-93(h). However, they were unable to challenge the retention of their vehicles, *pendente lite*. Instead, they had to wait months in order to prevail on the merits in the underlying CAF cases. The Eleventh Circuit affirmed both District Courts, without analysis, by the holding that the Sixth Amendment standard articulated in *Barker v. Wingo*, 407 U.S. 514 (1972) applies to the due process question of whether the State of Alabama may retain property seized incident to arrest under Alabama's civil asset forfeiture statute, *pendente lite*, without showing at a prompt post-deprivation hearing probable cause that the property will ultimately be forfeitable, or that a less restrictive means exists to secure the State's interest in the property pending resolution of the CAF action.

The Eleventh Circuit applied the *Barker* test despite its previous recognition that "a complaint of continued deprivation of legally seized property raises an issue of procedural due process under the Fourteenth Amendment," *Case v. Ehlinger*, 555 F.3d 1317,

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language appears in the legislative enactment. On the contrary, the Act states that it is effective January 1, 2022. The actions regarding these plaintiffs occurred long before that date. As such, the statute existing prior to the 2022 amendment referenced herein.

1330 (11th Cir. 1990), and that "the *Mathews v. Eldridge*, 424 U.S. 319 (1976) . . . test is the traditional test employed in order to determine what process is due before a deprivation of property at the hands of the state may be sustained." *U.S. v. Kaley*, 579 F.3d 1246, 1260 (11th Cir. 2009).

1. The *Culley* Case

Halima Culley asserted constitutional violations arising out of the seizure of her automobile by the City of Satsuma, incident to the arrest of her son in a Complaint filed in the United States District Court for the Southern District of Alabama on September 23, 2019. Her Complaint claims that the City of Satsuma, in concert with the State of Alabama, violated her Fourteenth Amendment rights by failing to provide her with a prompt, post-deprivation hearing as to whether her automobile should be retained by the State, *pendente lite*, and whether continued impoundment was the least restrictive way for the State to secure its interest in the vehicle during the pendency of the Civil Asset Forfeiture ("CAF") proceeding filed against her. Instead, the State of Alabama, upon referral by the City of Satsuma Police Department, made her a defendant in a case brought under Alabama's CAF statute. Ala. Code § 20-2-93.

Ms. Culley filed a Motion for Summary Judgment in the underlying State Court CAF action. That Motion was granted, and the Court ordered Culley's vehicle returned to her, finding that she was an innocent owner of the vehicle, and therefore her property was not subject to forfeiture under Ala. Code § 20-2-93(h).

2. The *Sutton* Case

Like Ms. Culley, Ms. Sutton filed a Federal class action complaint against the Town of Leesburg, Alabama claiming that she was improperly deprived of her automobile during the pendency of the CAF action filed against her by the State on because she was not provided a prompt, post-deprivation hearing at which the state would have to show probable cause that automobile was forfeitable, and that there was no less restrictive avenue for the state to secure its interest, *pendente lite*.

Subsequent to the damages action in this case, Ms. Sutton prevailed in the underlying CAF action in the State Court, making one argument: As an innocent owner under Ala. Code § 20-2-93(h), she had no participation in, or knowledge of, the use of her vehicle in a crime. The State Court granted Ms. Sutton's Motion for Summary Judgment.

After prevailing in the State CAF action, Ms. Sutton filed a Motion for Partial Summary Judgment as to liability in her Federal case, arguing that it had been judicially determined that the State never had any interest in her vehicle, and if there had been the prompt, post-deprivation hearing required by the Fourteenth Amendment, her vehicle would never have been retained by the State. The State intervened in a limited capacity, and then filed a Motion to Dismiss. The Town of Leesburg filed a Motion for Judgment on the Pleadings.

The District Court granted the Town of Leesburg's Motion for Judgment on the Pleadings and the State's Motion to Dismiss as to the claims under the Fourth and Eighth Amendments, but denied Defendants'

Motions regarding the Fourteenth Amendment due process claim, finding that the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), applied. A Rule 59 Motion as to that Order was denied.

The State filed a Motion for Summary Judgment on the Fourteenth Amendment claim. On September 13, 2021, the Court entered an Order denying Ms. Sutton's Motion for Partial Summary Judgment and granting the State's Motion for Summary Judgment. That is the Order appealed to the Eleventh Circuit.

Pursuant to an unopposed Motion to Consolidate, the *Sutton* and *Culley* cases were consolidated on appeal pursuant to FRAP 3(b)(2). On July 11, 2022, the panel issued its opinion affirming the District Courts' judgments. App.1a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT AMONGST THE CIRCUITS AS TO WHAT TEST TO USE TO ANALYZE PROCESS IS DUE, *PENDENTE LITE*, THOSE WHO HAVE HAD PROPERTY SEIZED INCIDENT TO ARREST UNDER A CIVIL FORFEITURE STATUTE.

This petition should be granted: (1) because there is conflict amongst the circuits on the controlling issue of federal law that; (2) this court has previously granted certiorari on, but was unable to reach because of a jurisdictional defect. No such defect exists in this case, and the Court should proceed to the question on the merits.

The issue before the Eleventh Circuit Court of Appeals in this case was clear: whether, when determining what process is due, *pendente lite*, those whose property has been seized incident to an arrest, the speedy trial test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972) should be applied, as opposed to the "traditional [*Mathews*] test employed in order to determine what process is due before a deprivation of property at the hands of the state may be sustained." *U.S. v. Kaley*, 579 F.3d 1246, 1260 (11th Cir. 2009).

The Eleventh Circuit panel decision on the issue was that "we remain bound, however, by our prior precedent 'unless and until [it] is overruled by our Court sitting *en banc* or by the Supreme Court . . . that a timely merit hearing affords a claimant all the process to which he is due, and that the timeliness analysis is governed by *Barker*'." App.9a.

A. The Eleventh Circuit Itself Acknowledges a Split Amongst the Circuits on the Issue Presented.

The first listed reason this Court would find an issue compelling enough to grant certiorari is where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . . " S. Ct. R. 10(a). The Eleventh Circuit itself recognized in its opinion in this case, and in previous opinions, that its reliance on *Barker* to decide due process issues relating to civil forfeiture is both in conflict with other circuits and stands alone among circuits that have considered the issue. The Eleventh

Circuit noted in its opinion below that "at least one circuit has taken their [Appellants'] view." App.9a, citing *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

Not only did the Eleventh Circuit note a conflict amongst the circuits in its panel decision, but it has previously recognized that "virtually every other circuit to address this issue other than this Court has found that criminal defendants such as these are entitled, under the Due Process Clause of the Fifth Amendment[4], to a pretrial hearing in order to determine whether it is likely that the restrained assets will be subject to forfeiture. In fact, the more recent cases have utilized the balancing test employed in *Mathews*." *Kaley* 579 F.3d at 1259-1260.

B. Other Circuits Have Recognized that the Civil Asset Forfeiture Trial Itself Does Not Satisfy Due Process Regarding Pretrial Restraint.

The application of the speedy trial test articulated in *Barker*, *supra*, to pretrial retention of an automobile seized incident to an arrest was specifically rejected by the Second Circuit in *Krimstock*, *supra*. Judge, now Justice Sotomayor, explained in *Krimstock* that the *Barker* test is inapposite:

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[4] While the *Kaley* Court was construing the Fifth Amendment due process guarantee in a case against the Federal government, its holding is applicable to this Fourteenth Amendment case against state entities because "the reach of the [due process clauses] of the Fourteenth and Fifth Amendments are coextensive." *Walker v. RJ Reynolds Tobacco Co.*, 734 F.3d 1278, 1287 (11th Cir. 2013), citing *Rodriguez-Mora v. Baker*, 792 F.2d 1524, 1526 (11th Cir. 1986).

Here, once the vehicles have been seized, and concerns for establishing jurisdiction and immediate prophylactic custody are satisfied, we find that the Due Process Clause requires that claimants be given an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles from sale or destruction *pendente lite*.

The City argues that the *Mathews v. Eldridge* balancing test is displaced by Supreme Court's decision to apply the speedy trial test, and not the *Mathews* inquiry, in examining the constitutionality of any delay in the return of property subject to future civil forfeiture proceedings. *See*, *United States vs. $8,850*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed. 2d 143 (1983) (applying the speedy trial test set forth in *Barker v. Wingo*, 407 U.S. 513, 33 L.Ed.2d 101, 02 S.Ct. 2182 (1982), in finding that an eighteen-month delay in filing a customs forfeiture action did not violate constitutional due process guarantees.)

We disagree. 'plaintiffs' claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted.' Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the city's retention of the vehicles while those proceedings are conducted. The application

> of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings . . . The impoundment of property—or the incarceration of a criminal defendant—certainly increases the hardship worked by any delay. The Constitution, however, 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.

Krimstock, 306 F.2d at 68. Not only did the Second Circuit in *Krimstock* specifically reject the application of *Barker* to the retention of property *pendente lite*, but every circuit court to consider the question has held that the proper test for determining whether a prompt, post-deprivation hearing is required when the government has placed pretrial restraint on property is the *Mathews* test.

The Fifth Circuit in *United States v. Holy Land Fund.*, 493 F.3d 469, 475 (5th Cir. 2007), reversed existing precedent, hold that, "In some cases, however, due process will require that the district court then promptly hold a hearing at which the property owner can contest the restraining order, without waiting until trial to do so. To determine when such a hearing is required, we consider the three *Eldridge* factors . . . "

The Seventh Circuit in *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), decided whether the pretrial restraint of a criminal defendants' assets pursuant to the criminal forfeiture statute, 21 U.S.C. § 853, "without affording him an immediate post restraint hearing violates the due process clause of the Fifth Amendment," *Moya-Gomez*, 860 F.2d at 716

was proper. The Moya-Gomez Court noted the same decision the Eleventh Circuit used to justify its decision in this case, *United States v. Eight Thousand Eight Hundred and Fifty Dollars, ($8,850) in United States Currency*, 461 U.S. 555 (1983), as providing "some support" for the proposition that the subsequent criminal trial provides adequate opportunity for a criminal defendant to contest the validity of a restraint on property. *Moya-Gomez*, 860 F.2d at 728. The Court, however, rejected this argument, holding that, "the present statutory scheme—allowing no opportunity to place in question the government's allegation that certain property is subject to forfeiture violates the due process clause . . . " *Moya-Gomez*, 860 F.2d at 729. This conclusion was reached after the Court applied the three-pronged *Mathews* analysis.

While *Holy Land Foundation* and *Moya-Gomez*, *supra*, focused on a particular concern of criminal defendants, *i.e.*, the ability to procure adequate counsel when their property is restrained, Alabama's Civil Asset Forfeiture statute is a more blunt instrument, affecting the *pendente lite* property rights not only of those accrued of a crime, but also those who have had property seized who have not been charged with a crime. That is the predicament *Sutton* and *Culley* found themselves in.

An accused's property necessary to retain adequate counsel, *pendente lite*, no doubt, is a property right protected by the Due Process Clause of the Fourteenth Amendment, and courts outside of the Eleventh Circuit have held unanimously that the *Mathews* test governs what process is due, including whether a prompt post-deprivation hearing is required. The nature of the property at issue in this case is no less

worthy of scrutiny under the *Mathews* test. "An individual has an important interest in the possession of his [or her] motor vehicle, which is after his [or her] most valuable possession." *Lee v. Thornton*, 538 F.2d, 27, 31 (2d Cir. 1976). "Automobiles occupy a central place in the lives of Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life." *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994). It was just this interest in an automobile that compelled the Seventh Circuit in *Smith v. City of Chicago*, 524 F.3d 824, 838 (7th Cir. 2008), vacated on other grounds, *Alvarez v. Smith*, 555 U.S. 1169 (2009), relying on *Krimstock*, to conclude that a "mechanism to test the validity of the retention of the property is required" by due process.

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

> obtain its release. It is hard to see any reason why an automobile, not needed as evidence, should not be released with a bond or an order forbidding its disposal.

Smith, 524 F.3d at 838.

The Ninth Circuit's opinion in *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985), addressed the particular concerns of innocent property owners like Ms. Sutton and Ms. Culley[5]. In *Crozier*, property was seized incident to arrests for drug crimes pursuant to 21 U.S.C. § 853(c). The Government obtained an *ex parte* order restraining the property of one not charged with any crime. The third party asserted that the forfeiture statute, which did not contain a provision for a

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[5] This Court in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) recognized the particular interest innocent property owners like Ms. Sutton and Ms. Culley have when property is seized incident to an arrest pursuant to a forfeiture statute. The Court held:

> . . . although Congress designed the drug forfeiture statute to be a powerful instrument in enforcement of drug laws, it did not intend to deprive innocent owners of their property. "Moreover, the availability of a post seizure hearing may be no recompense for losses counsel by an erroneous government seizure given the congested civil dockets in Federal courts, a claimant may not receive an adversary hearing until many months after the seizure and even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause. This determination, coming months after the seizure, 'would not cure the temporary deprivation that an earlier hearing may have presented.'"

James Daniel Good, 510 U.S. at 55, quoting *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991).

prompt, post-deprivation hearing "violate[d] her Fifth Amendment right to due process of law and that it is unconstitutional on its face because Congress failed to provide for a hearing on a restraining order before trial or conviction." *Crozier*, 777 F.2d at 1376. This is exactly the argument made by the plaintiffs in this case. The Ninth Circuit agreed:

> We hold that the forfeiture provisions of the Comprehensive Crime Control Act do not comply with the due process requirements of the Fifth Amendment to the United States Constitution. More specifically, we find 21 U.S.C. § 853(e)'s provisions for restraining orders or injunctions on the filing of an indictment, and the hearing provisions in 21 U.S.C. § 853(n) for those with third party interests, do not protect the rights of defendants and third parties.

Crozier, 777 F.2d at 1384. The *Crozier* Court, relying upon *Mathews* analysis, re-confirmed in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-43 (1955) the necessity to "balance the risk of erroneous deprivation, the state's interest in providing specific procedures, and the strength of the individual's interest." *See*, *Crozier*, 777 F.2d at 1383, citing *Loudermill*, *supra.*

Brown v. District of Columbia, 115 F. Supp. 3d 56, 66 (D. D.C. 2015), specifically rejected application of the *Barker* test for due process analysis when considering whether a prompt, post-deprivation hearing is necessary for those who have had vehicles seized incident to an arrest under a civil asset forfeiture statute. The Court stated, "Balancing factors outlined in *Mathews*, this Court joins with courts in *Krimstock*,

Smith and *Simms* in concluding that due process requires the government to provide claimants a prompt hearing to challenge the grounds for seizure of a vehicle and the 'probable validity of continued deprivation of [the] claimants property during the pendency of proceedings.'" *Brown*, 115 F. Supp. 3d at 66.

> The District alternatively contends that the *Mathews* test does not govern the question of what process is due to owners of seized property. It urges the Court instead to apply the four-factor test in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which is used to determine whether a criminal defendant's right to a speedy trial has been violated. In *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 565-69 (1983), and *United States v. Von Neumann*, 474 U.S. 242, 250-51, 106 S.Ct. 610, 88 L.Ed.2d 587 (1986), the Supreme Court applied the *Barker* test in challenges to the delay between the seizure of property and the subsequent forfeiture proceedings. The District argues that *$8,850* and *Von Neumann* establish *Barker*, and not *Mathews*, as the proper framework for assessing the Plaintiffs' due process challenge here.
>
> The Court disagrees. As then-Judge Sotomayor explained in rejecting the same argument in *Krimstock*, "the 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.

> *$8,850* and *Von Neumann*, like *Barker* itself, address only the latter. Plaintiffs' claim, by contrast, is aimed not at excessive delay but at how much process is due between seizure and the ultimate forfeiture decision. The *Mathews* test therefore applies. *See also City of Los Angeles v. David*, 538 U.S. 715, 716, 123 S.Ct. 1895, 155 L.Ed.2d 946 (2003) (applying *Mathews* in reversing a holding that an additional hearing was required after the municipality towed a vehicle); *Gilbert v. Homar*, 520 U.S. 924, 931, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997) (applying *Mathews* to a claim for a predeprivation hearing); *James Daniel Good*, 510 U.S. at 59 (same*); Tate v. District of Columbia*, 627 F.3d 904, 908, 393 U.S. App. D.C. 270 (D.C. Cir. 2010) (*Mathews* test applied regarding procedures to auction an impounded vehicle); *Property v. District of Columbia*, 948 F.2d 1327, 1331, 292 U.S. App. D.C. 219 (D.C. Cir. 1991) (*Mathews* test applied to the procedures for towing and destroying a vehicle). The Court will therefore apply the *Mathews* test to the District's seizures of vehicles before turning to seizures of currency.

Smith, 524 F.3d at 838.

II. THIS COURT HAS ALREADY DEEMED THIS ISSUE IMPORTANT ENOUGH TO GRANT CERTIORARI.

In addition to a conflict amongst the Circuits, this Court has already found this exact issue "an important matter" such that certiorari should issue to resolve the conflict amongst the circuits. In *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), the

Seventh Circuit determined that owners who had their vehicles seized pursuant to the Illinois Drug Asset Forfeiture Procedure Act ("DAFPA") were entitled to a "mechanism to test the validity of the retention of the property." *Smith*, 524 F.3d at 838. The Court, reversing existing Seventh Circuit precedent, specifically rejected the *Barker* test for determining what process is due such parties, *Smith*, 524 F.3d at 836, and applied the *Mathews* factors to determine that a prompt, post-deprivation hearing is necessary to comport with due process. *Smith*, 524 F.3d at 838. The governmental defendants filed a petition for writ of certiorari, which was granted, *Alvarez v. Smith*, 555 U.S. 1169 (2009), "Limited to Question 1 presented by the petition." Question 1 presented by the petition in *Alvarez* was:

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

Devine v. Smith, 2008 U.S. S.Ct. Briefs Lexis 2834 Sup. Ct. Case No. 08-351 (Sept. 15, 2008) (Petition for Writ of Certiorari). This is exactly the issue in this case, and the conflict amongst the circuit courts remains.

Smith was vacated as moot by *Alvarez v. Smith*, 558 U.S. 87 (2009), because the vehicles and cash at issue in the case had been returned by the time the

case reached the Supreme Court. The Court found "before us a Complaint that seeks only a declaratory and injunctive relief, not damages." That being the case, there no longer was a "live controversy" between the parties. *Alvarez*, 558 U.S. at 93. That is not the case here. While the vehicles have been returned, this is an action for damages, and had always been an action for damages, even before the vehicles were returned via judgment in the underlying civil asset forfeiture proceedings. The Eleventh Circuit specifically found the standing lacking in *Alvarez* extant in this case due to the "live" damages claims. The Court stated, "A live controversy remains, however, as to Ms. Culley's claim for monetary damages against the City of Satsuma, and as to Ms. Sutton's claim for monetary damages against the Town of Leesburg." App.6a.

In *United States v. Register*, 182 F.3d 820, 834 (11th Cir. 1999), the Eleventh Circuit itself recognized that it is "the only circuit holding that, although pretrial restraint of assets needed to retain counsel implicates the Due Process Clause, the trial itself satisfies this requirement," before citing contrary authority from the Fifth, Tenth, Seventh, Fourth, Ninth, Eighth, and Third Circuits.

This Court did not reach the discreet issue in *United States v. Monsanto*, 491 U.S. 600 (1989), because the trial court in the case "held an extensive, 4-day hearing on the question of probable cause" *Monsanto*, 491 U.S. at 615, n. 10. Hence, there was no need to determine whether such a hearing was necessary because a hearing had been provided. The Court did conclude, however, that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe

that the assets are forfeitable." *Monsanto*, 491 U.S. at 615. This cast even more doubt upon the Eleventh Circuit's outlier position in its own mind. The *Register* Court concluded, "Although, in the appropriate case, we perhaps should re-examine *Bissell*[6] in light of *Monsanto III* and its progeny." *Register*, 182 F.3d at 835.

The Eleventh Circuit went on in *Kaley* to state that, "If we were writing on a blank slate today, we would be inclined as Judge Tjoflat suggests in his special concurrence, to apply the test announced by the Supreme Court in *Mathews*." *Kaley*, 579 F.3d at 1259. This Court has that blank slate and should bring the Eleventh Circuit into line with the remaining circuits that have considered this important issue. The Court in *Alvarez*, *supra*, granted certiorari to review the issue, only to find it lacked jurisdiction due to later developments in the case. This case does not suffer from those jurisdictional deficiencies, and the Court should grant certiorari.

III. IF *MATHEWS* IS APPLIED IN THIS CASE, IT IS CLEAR THAT REVERSAL IS WARRANTED.

There seems little doubt that if the proper *Mathews* test is applied, a prompt, post-deprivation hearing would be required. The three *Mathews* factors: (1) private interest; (2) risk of erroneous deprivation; and (3) governmental interest, *Mathews*, 424 U.S. at 335, lead to the inexorable conclusion, as every court applying the factors has determined, that one deprived

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[6] *United States v. Bissell*, 566 F.2d 1343 (11th Cir. 1989), is an 11th Circuit case involving a forfeiture count in an indictment that used the *Barker* test to determine process due the criminal defendant in that context, as opposed to property seized incident to an arrest.

of property is entitled to a prompt, post-deprivation hearing on the issue of probable cause and proper form of the restriction. Such a hearing need not be the 4-day hearing the trial court conducted in *Monsanto*, *supra*. The *Krimstock* Court laid out the bounds of such a hearing:

> [W]e hold that, at a minimum, the hearing must enable claimants to test the probable validity of continued deprivation of their vehicles, including the City's probable cause for the initial warrantless seizure. In the absence of either probable cause for the seizure or post-seizure evidence supporting the probable validity of continued deprivation, an owner's vehicle would have to be released during the pendency of the criminal and civil proceedings.
>
> We hasten to point out that we do not envision the retention hearing as a forum for exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing. Inasmuch as the purpose of the hearing is the limited one of determining whether the vehicle should be returned to its owner during the pendency of proceedings, due process should be satisfied by an initial testing of the merits of the City's case. In addition, the retention hearing will allow the court to consider whether less drastic measures than continued impoundment, such as a bond or a restraining order, would protect the City's interest in the allegedly forfeitable vehicle during the pendency of proceedings.

Krimstock, 306 F.3d at 69-70. Just such a hearing is due in this case.

A. The Private Interest Affected

Plaintiffs were without their vehicles for over a year. "An individual has an important interest in the possession of his [or her] motor vehicle, which is often his [or her] most valuable possession." *Lee v. Thornton*, 538 F.2d 31 (2nd Cir. 1975); *Coleman v. Watt*, 40 F.3d 225, 260-260 (8th Cir. 1994).

B. Risk of Erroneous Deprivation

The second factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. The Court in *Krimstock II*, stated that, "the risk of erroneous deprivation that is posed to innocent owners is a substantial one." *Krimstock II*, 306 F.3d at 58. It has been judicially determined in these cases that Plaintiffs were innocent owners. The additional safeguard of the prompt, post-deprivation hearing would have made the Court aware of the very facts it relied upon to ultimately release the vehicles.

C. The Government's Interest

The third factor is the governmental interest. *Mathews*, 424 U.S. at 335. The State's interest in retention of the vehicles is ensuring that they will not "disappear" before a hearing on the merits of the CAF. This analysis requires the consideration of other, less restrictive, means:

> To ensure that the City's interest in forfeitable vehicles is protected, claimants could post

> bonds, or a court could issue a restraining order to prohibit the sale or destruction of the vehicle. *See id.* at 58-59 (suggesting judicial means to ensure that real property is 32 not sold or destroyed *pendente lite*). The need to prevent forfeitable property from being sold or destroyed during the pendency of proceedings does not necessarily justify continued retention of all vehicles when other means of accomplishing those goals are available.

Krimstock II, 306 F.3d at 65. If an appropriate bond is posted, or if a cloud on the title such as a notice of *lis pendens* can be placed, there is little risk.

This case is materially indistinguishable from *Krimstock*. The *Krimstock II* Court weighed the *Mathews* factors thusly:

> [W]e find that the Due Process Clause requires that claimants be given an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles from sale or destruction *pendente lite*. . . . the question is what reason the government has for refusing to exercise some means short of continued retention after seizure to guarantee that property will be available to satisfy a civil forfeiture judgment.

Krimstock II, 306 F.3d at 67.

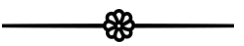
D. Plaintiffs' Innocent Owner Status Raises Particular Constitutional Concerns.

"Although Congress designed the drug forfeiture statute to be a powerful instrument in enforcement of the drug laws, it did not intend to deprive innocent owners of their property." *James Daniel Good*, 510 U.S. at 55. "If the ultimate judicial determination is that the claimant was an innocent owner . . . this determination, coming months after seizure, would not cure the temporary deprivation that an earlier hearing may have prevented." *James Daniel Good*, 510 U.S. at 55, quoting *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991).

The *Krimstock II*, Court applied the above-referenced reasoning to the *pendente lite* retention of an automobile.

> The impact of N.Y.C. Code § 14-140 on innocent owners is vividly illustrated . . . Although these charges were later dismissed, Ms. Jones was deprived of her vehicle for some ten months while continuing to make monthly auto payments on the vehicle. Ms. Jones was given no early opportunity to test the probable validity of the City's continued impoundment of her vehicle.

Krimstock II, 306 F.3d at 56-57. The same Constitutional concerns compel the same result here.



CONCLUSION

For the foregoing reasons, Ms. Sutton and Ms. Culley respectfully request that this Court issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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