THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

JUL 16 2012

S.C. Supreme Court

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

The Hon. Ernest F. Kinard, Jr., Circuit Court Judge

Opinion No. 4752

(S.C. Ct. App. Filed October 13, 2010)

Case No. 2008-CP-21-1071

James David Farmer .....Respondent,

v.

Florence County Sheriff's Office ..... Petitioner.

BRIEF OF PETITIONER

D. Malloy McEachin, Jr., Esquire
D. Malloy McEachin, Jr., P.A.
2117-C West Palmetto Street
Florence, SC 29501
843-665-0135

Attorney for Petitioner

Other Counsel of Record
Patrick J. McLaughlin
Wukela Law Firm
Post Office Box 13057
Florence, SC 29504
843-669-5634

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in holding that contraband seized pursuant to a valid warrant must be returned, without a subsequent determination that the items are not counterfeit, as a sanction for a 66-day post-plea bargain delay in the Sheriff's Office instituting forfeiture proceedings under Section 39-15-1195(C)?

A. Did the Court of Appeals err in its holding that, as only the Attorney General or Circuit Solicitor are entitled to institute Section 39-15-1195(C) proceedings, the Sheriff must do so?

B. The federal due process clause requires claimants to seized property be afforded "an opportunity to be heard;" did the Court of Appeals err in finding a violation because Section 39-15-1195(H) provides claimants "only" the "option" to be heard?

C. Did the Court of Appeals err in implicitly holding that 66 days from a guilty plea on related charges is an undue delay in instituting forfeiture proceedings sufficient to mandate automatic return of items properly seized due to probable cause to consider them counterfeit?

II. Did the circuit court have jurisdiction to issue orders regarding the property without forfeiture proceedings being filed under either 39-15-1195(C) or (H)?

III. Did the Court of Appeals err in sua sponte raising federal constitutional issues, in ruling in Plaintiff's favor under a theory opposite to the Plaintiff's theory of the case, and in remanding the aspect of the Order unfavorable to the Plaintiff on grounds that it was "unable to engage in meaningful review" of that part of the Order?

OVERVIEW

This case centrally involves a novel question of South Carolina law. Subsumed in that analysis are a question of constitutional law in which the Court of Appeals opinion conflicts with decisions of the Supreme Courts of the United States and of South Carolina, and questions of appellate procedure in which the panel's opinion conflicts with this Court's decisions.

The novel question of South Carolina law generally concerns whether a claimant to property properly seized as counterfeit merchandise by a policing agency such as a Sheriff's Department pursuant to a warrant expressly authorizing the seizure, may demand the Sheriff return the items without any subsequent judicial determination that the items are not contraband, and similarly whether the claimant may sue the Sheriff for damages because he did not return the items in response to a letter demanding their return. More particularly, it concerns whether an admitted intellectual-property thief may, via letter, demand that a policing agency return seized intellectual property within 66 days of his guilty plea on a related charge, and receive damages because the items were not so returned.

The question is important to sheriffs and police departments throughout the State; and involves important questions of public policy regarding the return of contraband.

Finding probable cause existed to believe that James David Farmer was selling pirated and counterfeit merchandise out of his store, the magistrate judge signed a warrant authorizing a search of the premises and specifically authorizing seizure of the goods. Farmer was then caught with intellectual property of others that he planned to sell

illegally. Farmer does not dispute that probable cause existed to believe his merchandize to be pirated and counterfeit. He specifically admits that much of the merchandise was pirated. He pled guilty to piracy. Nor does he claim a right to return of the admittedly pirated merchandise. However, he wants damages from the Sheriff for having not returned the rest of the merchandise – the merchandise for which he admits there was probable cause to believe counterfeit. He wants to obtain damages without having any judge ever decide whether the merchandise is in fact contraband, and with no judge other than the magistrate who issued the warrant ever ruling on whether probable cause existed at the time of the seizure.

The admitted pirate also wants punitive damages.

He also wants the allegedly counterfeit merchandise returned.

Both sides appealed. The Court of Appeals affirmed that part of the Order requiring the Sheriff to return the merchandise without any court passing judgment on whether the merchandise is contraband (again, other than the initial magistrate's finding of probable cause), and remanded for further development the pirate's appeal of the dismissal of his punitive and actual damage causes of action.

STATEMENT OF THE CASE

Pre-Suit

The Plaintiff, James David Farmer, was caught with intellectual property of others that he planned to sell illegally. Finding that probable cause existed to believe that Farmer's store made a business of selling such property, Magistrate Judge James Harwell had issued a search-and-seizure warrant which led to the seizure and the arrest. R. p. 2. A plea bargain was worked out, via which Farmer pled guilty to possession with intent to

sell some of the property, and other charges were either reduced or dismissed. The items seized pursuant to the warrant included more than 250 pirated recordings, machines for making pirated recordings, and allegedly counterfeit clothing and shoes. R. p. 4. The plea bargain had him plead to possession of not more than 50 pirated recordings, and the other charges were dismissed. R. p. 11.

Farmer's attorney then sent the Investigator a letter, demanding he return the clothing and shoes (not the excess recordings). R. p. 18. He did so on February 5, 2008, less than two weeks after the guilty plea of January 23rd. He demanded the items back on grounds the charges had been dismissed. He further explained that "[T]oday's clothing manufacturers do not even make their own products and cannot accurately identify what is or is not their product. Hence, there is no trademark violation." Id. (He further stated that "to support" the legal status of these items he had obtained receipts. These receipts were not from the manufacturers. They were, he explained, from certain "publications." Id.) The seizure of the allegedly counterfeit items "has greatly hindered his ability to operate his business," he complained. A month later, the attorney sent the Investigator a second letter, stating that if Farmer did not receive the "merchandise" within ten days, he would "bring this matter before the Court." R. p. 21.

Lower Court Proceedings

He then brought suit. However, he did not do so under S.C. Code Ann. § 39-15-1195(H), which provides (emphasis added),

> (1) An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter. Notice . . . must be directed to all persons and agencies entitled to notice as provided in § 44-53-530. If the court denies the application, the hearing may proceed as a forfeiture hearing held pursuant to the provisions of § 44-53-530.

Farmer's complaint did not mention ¶ (H).

Instead, relying on ¶¶ (B) and (D) of that same statute, he sought damages against the Sheriff for "illegally" holding his property. Paragraph (B) provides that counterfeit property may be seized. Paragraph (D) states (emphasis supplied):

> (D) Property taken or detained pursuant to this section is not subject to replevin but is considered to be in the custody of the department making the seizure, subject only to the orders of the court having jurisdiction over the forfeiture proceedings.

His complaint stated, in pertinent part, R. p.13,

> 14. If a seizure is made pursuant to S.C. Code Ann. § 39-15-1195(B), proceedings pursuant to S.C. Code Ann. § 44-53-53-530 regarding forfeiture and disposition must be instituted within a "reasonable time."
>
> 15. S.C. Code Ann. § 39-1 5-1195 (D) specifically states property seized pursuant to this statute is not subject to replevin.
>
> 16. Therefore, because the Plaintiff was statutorily barred from filing an action for the return of his inventory, Defendant FCSO had a statutorily created duty to institute forfeiture proceedings in a reasonable time.

His claim, more generally, was that the Sheriff had prevented him offering the items for sale to the public, and he was thus entitled to damages for lost profits.

Each party moved for summary judgment; a hearing was held; Farmer then added a claim for return of the goods.

By Order of September 26, 2008, the trial judge announced what he deemed a "reasonable compromise": Farmer could not sue for damages, unless the items were returned in a damaged condition; the Sheriff must return the items to Farmer. The Sheriff had argued that the proper procedure for a claimant, such as Farmer, seeking return of property was to file an action under ¶ (H), in which he could litigate the question of whether the items were in fact counterfeit and/or whether probable cause had existed.

Such a determination was essential to any of Farmer's claims, the Sheriff maintained. The Order rejected this reasoning. It explicitly recognized there had been "no hearing to determine whether or not said items violated S.C. Code Ann. § 39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark)." Nevertheless, the lower court held, "The Sheriff's Office simply cannot hold the Plaintiff's property unless it is being held for use in a criminal proceeding," and "if said items are, in fact counterfeit and he attempts to traffic such items after their return, he will, again, be subject to criminal charges." R. pp. 90-91.

The Appeal and Petition for Rehearing

Each party appealed. The Court of Appeals remanded, for further development, that aspect of the Order unfavorable to Farmer; i.e., the holding on damages. It affirmed that aspect requiring the Sheriff to return the items, subject to the proviso that Farmer may be re-arrested if he tries to sell the items (as Farmer has pledged to do) and if they are in fact counterfeit (as the Sheriff has maintained should be determined before any items are ordered to be returned).

The Court of Appeals rested its decision neither on § 39-15-1195(H), which the Sheriff had deemed of great importance, nor on ¶ (D), on which Farmer had based his complaint. Instead, the panel rested its decision on ¶ (C), which had been implicitly raised by Farmer in his complaint. Paragraph (C) provides, in its entirety,

> (C) If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.

The panel recognized that ¶ (C) did not state who was to institute such proceedings. For that, it looked to § 44-53-530, as ¶ (C) directs it to do. S.C. Code Ann. 44-53-530 (2002 & Supp. 2009) provides, in especially pertinent part (emphasis added),

> (a) Forfeiture . . . must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized. The petition must be submitted to the court within a reasonable time period following seizure . . . A copy of the petition must be sent to each law enforcement agency which has notified the petitioner of its involvement in effecting the seizure. Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure. . . .
>
> The judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed. If the judge finds a forfeiture, he shall then determine the lienholder's interest as provided in this article.

The panel held, Opinion, pp. 5-6:

> Although section 39-15-1195 does not indicate who is to institute a forfeiture proceeding, section 44-53-530 of the South Carolina Code (2002 & Supp. 2009), which is referenced within paragraph (C) of the statute, describes the procedures required to finalize a forfeiture of property seized in connection with the enforcement of laws regulating controlled substances. These procedures include a petition by the Attorney General, the circuit solicitor, or the appropriate designee, that identifies the seized property and all persons known by the petitioner to have interests in it. Farmer, then, could not have invoked section 39-15-1195(C) to obtain a forfeiture hearing.

The panel nevertheless found that the Sheriff had an obligation to commence forfeiture proceedings under ¶ (C). The Sheriff timely petitioned for rehearing. If only the Attorney General, the Circuit Solicitor, or the Attorney General's or Circuit Solicitor's designee may institute proceedings pursuant to 39-15-1195(C)/44-53-530, the Sheriff argued, then Farmer's case collapses, for the Sheriff is not the Attorney General, nor is the Sheriff the Solicitor, nor had either designated him to invoke 39-15-1195(C).

Moreover, the Sheriff continued, the statutory scheme was sensible. It called for the Sheriff, police, or similar state agency to report to the circuit solicitor or state attorney general, as the case may be; that office then took responsibility for the resulting civil suit. The statutes as written place responsibility for searching, seizing, and arresting in the hands of agencies with special expertise in searching, seizing, and arresting, and place responsibility for the resulting civil lawsuit in the hands of agencies with special expertise in practicing law, the Sheriff maintained. The panel's reading placed an undue burden on small-town policing agencies which lack the resources to hire attorneys to institute such actions, it would be better to read the statute so as to avoid a requirement that these agencies practice civil law.

A second aspect of the panel decision was also a major issue in the petition for rehearing.

> Because section 39-15-1195(C) requires law enforcement to institute forfeiture proceedings "within a reasonable time," we hold that any failure on Farmer's part to exercise an option provided under section 39-15-1195(H) does not excuse the Sheriff's Office from discharging its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner.

Opinion, p. 7. Farmer had explicitly based his suit for damages and return-of-property-without-a-merits-hearing on his theory that he was "statutorily barred" from instituting formal proceedings at which the legality of the items would be determined. The Sheriff had defended in large part by contesting Farmer's claimed statutorily inability to institute such proceedings, especially citing ¶ (H), which explicitly affords an owner the right to institute such proceedings. Petitioning for rehearing, the Sheriff reiterated that a statutory mechanism for an owner to seek return of his property could not be bypassed in such a manner, especially on these facts. Procedurally, the Sheriff argued it was improper for

the panel in effect to re-write the Plaintiff's complaint. It had been undisputed below that Farmer's claim rested on his supposed inability to institute such proceedings. The panel declared that inability irrelevant. The discretion afforded appellate courts to affirm for any reason appearing in the record did not extend so far as to uphold summary judgment against a Defendant on a ground at war with the Plaintiff's theory of the case.

The Petition challenged other aspects of the opinion as well. The panel's sua sponte analysis of federal constitutional law was inappropriate and erroneous for numerous reasons, the Sheriff maintained; the panel had misperceived certain arguments and overlooked others; the panel had erred in remanding, rather than affirming, that aspect of the Order favorable to the Sheriff.

More generally, the Sheriff protested the idea of returning items, for which probable cause had been found to believe to be counterfeit, to an admitted pirate who vows that if they are returned, he will again attempt to sell them to the public, without a judicial determination, prior to their return, of whether the items "'are, in fact counterfeit'". He similarly protested any implication that he may be sued for damages for holding items pursuant to a valid court order instructing him to seize the items, when there had been no determination that the items were not in fact counterfeit.

The panel denied rehearing via Order filed December 17, 2010. The Sheriff petitioned the Supreme Court to issue the writ of certiorari. The Court granted the petition on May 25, 2012.

ARGUMENT

Arguments from each section are incorporated into all sections. The case now[1] centers on portions of two inter-related statutes, S.C. Code Ann. §§ 39-15-1195 (Supp. 2009) and 44-53-530 (2002 & Supp. 2009). Extensive excerpts are provided in Exhibit 1.

All matters discussed herein are matters of law. The standard of review is de novo. See Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("[T]his Court reviews questions of law de novo.")

THE PANEL ERRED IN HOLDING THAT THE OWNER OF ITEMS PROPERLY SEIZED AS CONTRABAND PURSUANT TO A WARRANT MAY DEMAND THE ITEMS BE RETURNED AND/OR MAY SUE THE SHERIFF FOR DAMAGES, WITHOUT PURSUING STATUTORY OR EQUITABLE MECHANISMS TO DETERMINE WHETHER THE ITEMS ARE, IN FACT, CONTRABAND.

THE CENTRAL HOLDING

The Court of Appeals affirms that aspect of the order requiring return of the seized items due to the Sheriff's supposed delay in instituting forfeiture proceedings. The central holding is:

> Because section 39-15-1195(C) requires law enforcement to institute forfeiture proceedings "within a reasonable time," we hold that any failure on Farmer's part to exercise an option provided under section 39-15-1195(H) does not excuse the Sheriff's Office from discharging its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner.

The panel errs in numerous ways. Procedurally, it errs because its holding is at war with Farmer's theory of the case. However, the present concern is substantive; the

[1]Famer's complaint did not cite Section 44-53-5300, nor did it cite ¶ (H) of the '1195 statute. He cited directly only ¶¶ (B) and (D) of the '1195 statute, and cited (D) only for the proposition that replevin was not available, leaving out the jurisdictional aspect of (D).

procedural error is reserved for discussion with other procedural errors later in this Petition. The holding has two parts: (A) that the Sheriff had a statutorily mandated responsibility under 39-15-1195(C) to institute forfeiture proceedings (and to do so in a timely manner); (B) the failure by Farmer to exercise an "option" is irrelevant. Each is multiply and seriously flawed.

I. THE OPINION CONTRADICTS ITSELF AND CONTRADICTS THE STATUTE IN FINDING A "STATUTORILY MANDATED RESPONSIBILITY" FOR A SHERIFF'S OFFICE TO INSTITUTE PROCEEDINGS UNDER 39-15-1195(C).

A. The Opinion Contradicts Itself and Contradicts the Statute.

The panel holds:

> Although section 39-15-1195 does not indicate who is to institute a forfeiture proceeding, section 44-53-530 of the South Carolina Code (2002 & Supp. 2009), which is referenced within paragraph (C) of the statute, describes the procedures required to finalize a forfeiture of property seized in connection with the enforcement of laws regulating controlled substances. These procedures include a petition by the Attorney General, the circuit solicitor, or the appropriate designee, that identifies the seized property and all persons known by the petitioner to have interests in it. Farmer, then, could not have invoked section 39-15-1195(C) to obtain a forfeiture hearing.

It then concludes, "section 39-15-1195(C) requires law enforcement to institute forfeiture proceedings . . . ." The route it took to that conclusion, which involves a sua sponte exegesis of federal constitutional law, is also multiply flawed, as discussed in an ensuing section. However, it suffices to resolve the entire case that the logic by which the panel proves one element of Farmer's case, that Farmer could not have instituted proceedings under 39-15-1195(C), is fatal to the other element of Farmer's case, that the Sheriff could have instituted proceedings under 39-15-1195(C).

It is undisputed that neither Farmer nor the Sheriff is the Attorney General, nor is either the Circuit Solicitor, nor is either the designee of the Attorney General or the Solicitor. The panel holds that under the statutes, only the Attorney General, the Solicitor, or one designated by either of them may institute ¶ (C) proceedings. It follows that the Sheriff could not have instituted such proceedings. Farmer's entire case collapses.

The Sheriff does not dispute the panel's reading that 44-53-530 allows only certain entities to institute forfeiture proceedings; it challenges only the panel's refusal to apply that reasoning consistently. The portion of Section 44-53-530 cited by the panel makes clear who may institute such proceedings. The principle of expressio unius est exclusio alterius would preclude a finding that others were so entitled, even had the statute not contained the mandatory language "must be." ("Forfeiture . . . must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee," not "Forfeiture . . . may be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee").[2] The panel's reading of the statute as limited to the named entities is entirely correct. Its conclusion that somehow a Sheriff has an obligation under that statute is therefore contrary to the statute.

The opinion contradicts its own reasoning and the literal language of the statute in finding an obligation on the part of the Sheriff.

---

[2] A look further into the statute makes even more clear that neither a private claimant nor a policing agency is authorized by '530 or '1995(C) to institute such suits; rather, they are merely to be notified that suit has been filed, notified of the scheduling of hearings and the like. "A copy of the petition must be sent to each law enforcement agency which has notified the petitioner of its involvement in effecting the seizure." 44-53-530(a). "Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure. . . ." Id.

The opinion holds contrary to the intent of the statute, not merely its literal language. 44-53-530 and 39-15-1195 make clear that they contemplate different roles for policemen and for lawyers. Policing agencies, such as Sheriff's departments, are to investigate, seize, and arrest. Lawyers' agencies, such as Solicitors' Offices or the Attorney General, are to institute and handle the resulting civil suit. The role of the policing agency, as far as any forfeiture proceedings go, is to report to the lawyers' agency that a seizure has occurred. The policing agency reports to the lawyers, who handle the civil case from that point on. The lawyers, having received the report, are to institute the suit. E.g., 39-15-1195(G) (policing agency must report to the prosecuting agency); 44-53-530(a) (the solicitor's or Attorney General's office that instituted the suit must inform the policing agency); id. (44-53-530 proceedings must be brought by the solicitor, the attorney general, or their designee); 39-15-1195(H)(1) (if the forfeiture proceeding is instead initiated by the private litigant, he too must inform the policing agency).

The legislative plan makes sense: agencies whose primary expertise is in investigation, arrest, search, and seizure are to investigate, arrest, search and seize; agencies whose primary investigation is in bringing lawsuits are to initiate and pursue the resulting lawsuit.

In contradicting its own reasoning, the opinion contradicts the plain language of the statutes, the obvious legislative intent, and common sense.

B. Special and Important Reasons Exist to Reverse the Court of Appeals on this Novel Question of State Law.

Other than the decision challenged here, no reported decision of this Court or the Court of Appeals has ever considered whether policing agencies have either a statutory authorization or a statutory mandate to institute 39-15-1195(C) proceedings.

It is obviously unfair and illogical to apply a principle to only one of two parties. Because the Court of Appeals has done so, and in so doing ruled on a novel question of South Carolina law in a manner contrary to the plain language of the statutes and to legislative intent, the Court should REVERSE the decision below.

Other special and important reasons to reverse may not be immediately obvious. Many smaller policing agencies have no attorney on staff. If they are to be required to hire private attorneys when they seize property, basic economic theory, as well as common sense, indicates they will engage in fewer seizures. The legislature certainly did not intend to suppress seizure activity. As the opinion currently stands, the smaller policing agencies are placed in an intolerable position: they cannot ignore contraband, to do so would violate their oath to uphold the laws. They cannot engage attorneys to handle the contraband cases; there are no spare funds. The legislature did not intend to place them in that bind.[3]

---

[3] As noted above, proceedings under ¶ (C) or (H) are civil, and may only be commenced in a circuit court. Non-lawyers may not practice law in a civil, circuit court. E.g., Renaissance Enters., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999). Filing suit, prosecuting the suit, deciding what evidence to submit to the court, are quintessentially the practice of law. In re Richland County Magistrate's Court, 389 S.C. 408, 411, 699 S.E.2d 161, 163 (2010). Were a policing agency without a lawyer on staff to send an employee to represent the agency, the employee would be practicing law. Any legislative directive to institute suit would not make it any less a crime, for under the state Constitution, only this Court has the authority to define the

II. The Opinion Misconceives Forfeiture Law, Especially the Crucial Importance of an Opportunity to Be Heard.

How does the opinion reason from its conclusion that only the Attorney General, Circuit solicitor, or their designee may institute ¶ (C) proceedings, to its conclusion that the Sheriff can and must? How does it answer the Sheriff's defense that Farmer had the option to institute proceedings under ¶ (H)? How does it reach its more general conclusion that the property must be returned? It sua sponte analyses federal constitutional law. It reasons that Farmer "must be afforded the basic due process notice and hearing rights," and, that "due process grounds" are "recognized as reason . . . to order the return of the seized property." (Its analysis focuses on ¶ (C); for unexplained reasons, ¶ (H), which explicitly provides hearing rights to a claimant, is not mentioned). The panel concludes,

> The Sheriff's Office further argues that Farmer should have sought return of his property under section 39-15-1195(H). This section, however, only gives an aggrieved owner of items confiscated pursuant to section 39-15-1195 the option to "apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter." Because section 39-15-1195(C) requires law enforcement to institute forfeiture proceedings "within a reasonable time," we hold that any failure on Farmer's part to exercise an option provided under section 39-15-1195(H) does not excuse the Sheriff's Office from discharging its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner.

---

practice of law. Thus, the agencies could not moot the problem by sending an employee to court.

Under the same principles that animate the federal canon of constitutional avoidance, Clark v. Martinez, 543 U.S. 371, 385 (2005) ("[W]hen, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; . . . the canon functions as a means of choosing between them"), the better practice would have been for the Court of Appeals to look for a reading of the statutory scheme that does not raise such questions, if one exists. There is such a construction, as argued above. See also cases cited in Part IV.

Its analysis cites only two federal cases; one it misreads; the other relied on precedent that has been expressly overruled. First, however, a more fundamental problem is addressed.

A. Overview of Due Process Concerns in Forfeiture Cases

The fundamental due process right at issue in seizure of property cases, including forfeiture cases, is "notice and an opportunity to be heard." Notice is not remotely at issue here; the panel's concern appears to be with what it calls federal "hearing rights" and which federal courts more often, and more precisely, refer to as "the opportunity to be heard." A leading case is Fuentes v. Shevin, 407 U.S. 67 (1972) (passim) (repeatedly using the phrase, "opportunity to be heard.").[4] For United States Supreme Court cases, see also Tennessee v. Lane, 541 U.S. 509, 532-533 (2004) ("'[A] State must afford to all individuals a meaningful opportunity to be heard' in its courts.") (emphasis added) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard.'") (emphasis added) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

The forfeiture cases claim that undue delay in affording this "opportunity to be heard" amounts to a due process violation. As this formulation makes clear, the due process concern is simply that the claimant have the option to be heard. Were there any doubt, Fuentes spelled it out:

> [T]he aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an opportunity to be heard. . . . And, of course, no

[4] United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983), on which the panel relies, cites Fuentes, at 562 & 563 n.12.

> hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.

Id., 407 U.S., at 93 n.29 (emphasis in original).

The South Carolina Supreme Court has similarly held. A "post-seizure opportunity to be heard fully satisfie[s] the requirements of due process." State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (emphasis added). "[C]ourts have consistently held that post-seizure procedures are sufficient." Myers v. Real Property at 1518 Holmes Street, 306 S.C. 232, 236, 411 S.E.2d 209, 212 (1991). A claim of unconstitutional denial of a pre-seizure hearing "is untenable when the claimant is afforded the full weight of judicial process in proceedings . . . to determine if the claimant's property was properly forfeited." Id. "The most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.'" 192 Coin-Operated Video Game Machs., id., at 197, 525 S.E.2d, at 883 (emphasis added) (quoting Moore v. Timmerman, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)).

The Supreme Courts, State and Federal, have consistently interpreted the relevant due process provision in an identical manner. The most due process requires is an opportunity to be heard. The Federal Court writes, "[W]e deal here only with the right to an opportunity to be heard. . . . And, of course, no hearing need be held unless the defendant . . . takes advantage of [the opportunity]," Fuentes, 407 U.S., at 93 n.2; the State Court writes, "The most due process requires" is an "opportunity . . . to come forward" and present to the court his argument that the items are not properly forfeit, 192 Coin-Operated Video Game Machs., id., at 197, 525 S.E.2d, at 883.

The panel disagrees. Paragraph H is insufficient, the panel holds, because that provision "only gives an aggrieved owner . . . the option" to come forward and show the court his argument that the items are not properly forfeit (emphasis added). "[A]ny failure on Farmer's part to exercise an option" is simply irrelevant, the panel reiterates. The panel's holding that "due process grounds" justify return of the property because the claimant had "only" the opportunity/option to be heard contradicts entire lines of federal cases on the federal constitutional issue, including the leading case of Fuentes and numerous other decisions of the United States Supreme Court. It conflicts with prior decisions of this Court similarly interpreting the constitutional issue.

Farmer's choice not to take advantage of the option does not create a due process issue. "[O]f course no hearing need be held," the claimant need only have the option for a hearing if he so chooses. Farmer had the option to be heard by a circuit court judge. He chose not to take advantage of it. Far from being irrelevant, the option to be heard is dispositive.

Because the intermediate appellate court's opinion conflicts with entire lines of federal cases and the decisions of this Court on a substantial question of federal constitutional law, the opinion should be reversed.

B. The Panel's Erroneous Rationale.

It more than suffices to reverse that the panel's holding directly conflicts with holdings of the two Supreme Courts. Yet the panel's rationale is also flawed.

The panel cites to cases where property was seized by Government agents with no pre-deprivation hearing pursuant to statutes that permitted the Government, and only the

Government, to institute judicial proceedings regarding the property. (More technically, those statutes permitted only the executive branch of government to institute a post-seizure forfeiture proceeding before a judicial officer). Under those statutes, unless the Government instituted such proceedings, the statutes denied claimants any "opportunity to be heard" by a judicial officer. Thus, when the Government seized property and instituted court proceedings only after a pronounced delay, the question was whether the delay in affording the right was so extreme as to amount to a denial of the right. "The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings 'at a meaningful time.'" Fuentes, 407 U.S., at 80 (quoting Armstrong v. Manzo, 380 U.S., at 552. "[T]he right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" Id.

Thus, via the legislative branch enacting a statute, and the executive branch applying it – and denying judicial branch involvement for a significant length of time – a due process issue is created due to delay in affording a hearing before a judicial officer.

The South Carolina legislature, on the other hand, has mooted that problem entirely by providing claimants the right to institute the proceedings themselves. They have a statutory right to be heard regardless of what the executive branch does. Perhaps the South Carolina legislature added that provision to avoid the cases concerning allegedly unconstitutional delays that have plagued the federal courts. Perhaps it added that provision as a way to equalize the playing field between the Government and the Claimants. It does not matter why the legislature added the provision; all that matters is

that it did add a provision allowing claimants dissatisfied with the Government's pace to institute the proceedings themselves, and thus mooted the constitutional claims.

The panel ripped language out of cases concerning executive branch delay pursuant to statutes that denied claimants the right to institute proceedings themselves. See Opinion, pp. 6-7 (citing United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983) and United States v. $62,972 in United States Currency, 539 F. Supp. 586 (D. Nev. 1982)). Indeed, these were the only two cases the opinion cites as to the constitutional concerns posed by delay. They are simply inapplicable.

C. The Panel's Additional Misreadings of the Decisions on which It Relies.

The panel cites three cases concerning constitutional grounds. Two are federal cases, cited immediately above. These specifically concern delay in affording the opportunity to be heard. The third is a state case, Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981). It errs in its interpretation of each.

Moore can be dispensed with quickly. The panel quotes Moore for the proposition that "[I]f . . . property seized is intended to be subject to forfeiture, then the parties claiming an interest in the property must be afforded the basic due process notice and hearing rights." Opinion, p. 8. Petitioner does not doubt that undisputed proposition. However, more fully, Moore explained, "'A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution.'" Id., at 109, 276 S.E.2d, at 293 (quoting 37 C.J.S. Forfeitures § 5(b), at p. 11-12)). The Court further stated, "A party with an interest in the

seized property must be given the opportunity to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law." Id. In short, the constitutional concern, according to Moore, is to ensure that the claimant has the option to be heard. The panel errs in reading Moore to reverse effect.[5]

The panel's reliance on federal opinions is erroneous for reasons in addition to the problem that they concern statutes which, unlike the South Carolina statute, limit to the executive the right to institute court proceedings. The sole Federal Supreme Court case on which the panel relies is United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983). Yet in $8,850, the Federal Supreme Court actually endorsed the constitutional version of an argument made to the trial court by the Petitioner. In fact, it endorsed two of Petitioners' arguments rejected by the Court of Appeals.

Most broadly, it endorsed Petitioner's argument that a claimant may not sleep on his rights and then seek damages or return of the property as a penalty for the delay. He must do what he can to obtain a hearing. This is so even under statutes, such as the statute at issue there, that allowed only the executive branch to institute the proceedings.

> The third element to be considered in the due process balance is the claimant's assertion of the right to a judicial hearing. A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order

[5] Even if the decision in Moore were ambiguous – Petitioner sees no ambiguity, but if it were – any question as to whether Moore could be extended to imply a due process right to a hearing that extends beyond being afforded the option to have a hearing was eliminated by this Court's decision in 192 Coin-Operated Video Game Machs., 338 S.C., at 197, 525 S.E.2d, at 883: "The most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.'" (emphasis added) (quoting Moore, 276 S.C., 109, 276 S.E.2d, at 293).

> compelling the filing of the forfeiture action or return of the seized property. See Slocum v. Mayberry, 2 Wheat. 1, 10 (1817) (Marshall, C. J.). Less formally, the claimant could simply request that the Customs Service refer the matter to the United States Attorney. If the claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property. Vasquez did none of these things and only occasionally inquired about the result of the petition for mitigation or remission and asked that the Secretary reach a decision promptly.

461 U.S., at 568-69.

Thus, even when all that is available is to ask the executive branch to institute the hearing, a claimant must do what he can to obtain the hearing. This is entirely consistent with the Sheriff's argument below that Farmer should have taken advantage of the procedure available to him to obtain a forfeiture hearing. The claimant could ask the executive branch to institute a hearing, the Court held. The claimant could file an equitable action seeking an order compelling the filing of the forfeiture action, the Court held. This is directly analogous to the Sheriff's argument to the trial court that in addition to instituting proceedings under (H), Farmer could have brought a declaratory and/or injunctive action to require the proper party to bring the forfeiture action. Farmer did none of these. He simply wrote the Sheriff's office demanding his property be returned without a hearing.

More broadly yet, the Supreme Court's focus on what the claimant could do to obtain a hearing is contrary to the panel's holding that the "option" to have a hearing is irrelevant.[6]

---

[6] While the concern here is the panel's conflict with the United States Supreme Court opinion on which it relies, it might be pointed out that the decision challenged here is the only decision Petitioner is aware of that reads $8,850 as support for the proposition that the opportunity for a hearing is irrelevant. Federal cases following $8,850 have taken it

The panel cites only one other opinion concerning due process issues. That opinion is United States v. $62,972 in United States Currency, 539 F. Supp. 586 (D. Nev. 1982). The panel reads that opinion accurately. However, that opinion has been in effect overturned.

In $62,972, the district court explicitly and repeatedly relied on an appellate decision that was itself overturned the next year. That later-overruled appellate court decision was the Ninth Circuit's decision in $8,850. See $62,972, 539 F. Supp., at 588-91 (repeatedly citing and quoting United States v. Eight Thousand Eight Hundred Fifty Dollars, 645 F.2d 836 (9th Cir. 1981), overruled, 461 U.S. 555 (1983)).

Although Shepard's does not list $62,972 as overruled, that is simply because no decision subsequent to the reversal of $8,850 has ever addressed the case.

In fact, no decision prior to the Supreme Court reversal of $8,850 addressed the $62,972 decision. In the thirty years since the District of Nevada decided the case, no published decision of any court, state or federal, has relied on or even cited $8,850. Nor does LEXIS list any unpublished decisions citing the case.

It is ironic that the panel relied, for the same point, on both the Supreme Court's decision in $8,850 and on a case which that decision effectively overturned.

Thus, the panel's interpretation of two cases, Moore and $8,850, is directly contradicted by those cases themselves. It also directly contradicted by later cases

---

as a matter of course that $8,850 holds the availability to the claimant of means to obtain a hearing is highly relevant. E.g., United States v. Fifty-Two Thousand and Eight Hundred Dollars ($52,800.00) in U.S. Currency and Interest, 33 F.3d 1337, 1340-41 (11th Cir. 1994) (following $8,850, and holding it was reversible error to order return of seized property due to a delay in instituting forfeiture proceedings, "most importantly [because] claimants could have avoided the prejudice by asserting their rights."; "[N]othing prevented claimants from filing a claim"); United States v. U.S. Currency in the Amount of $228,536.00, 895 F.2d 908 (2d Cir. 1990) (similar).

applying those cases. The panel's decision would be supported by the final case it cites, $62,972, had that case not been effectively overturned.

This, too, amply suffices to warrant reversal. The decision challenged here is contrary to the federal Supreme Court decision it cites, and consistent with an in-effect-overturned district court case.

Were more required, Petitioner would respectfully point out:

(a) a 66-day time span following a plea bargain does not approach the delay required for a due process violation. E.g., United States v. $10,755.00 in United States Currency, 523 F Supp. 447, 449 n.4 (D. Md. 1981) (20-month delay after denial of certiorari on underlying case insufficient to require return of the goods); United States v. $27,000.00 in United States Currency, 865 F. Supp. 339, 342 (S.D. W. Va. 1994) (fifteen months after entry of guilty plea before institution of forfeiture proceedings insufficient to require even partial release of seized currency; such a timeframe is "the normal course of events").

(b) the opinion fails to distinguish between counterfeit merchandise and run-of-the-mill forfeitable property, a distinction of significance in forfeiture cases, as discussed in the next section.

D. The Decision Conflicts with Basic Principles of Statutory Construction in Finding Paragraph (H) Irrelevant and in Ordering Return of the Items as a Sanction for Delay.

The cardinal principle of statutory construction is to determine the intent of the legislature. E.g., MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008). Statutory "language must . . . be read in a sense which

harmonizes with its subject matter and accords with its general purpose." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). The obvious purpose of ¶ (H) is to provide a means for a clamant dissatisfied with the Government's pace to gain relief.

The underlying intent behind this provision may be one of concern for the private claimant. As noted above in the discussion of constitutional issues, the federal system, in which many forfeiture statutes lack direct provisions for private parties to obtain a judicial hearing, has been beset by cases claiming a resulting due process violation when the government is slow to institute forfeiture proceedings. See cases cited in the previous section. The South Carolina legislature may have desired to spare citizens from possible release of contraband to claimants, to spare taxpayers the possibility of damages, or to spare courts the need to decide such suits. All these ills are prevented by providing the private claimant, dissatisfied with the government's pace, the entitlement to institute the suit himself, rather than wait for the government.

However, whatever the intent-behind-the-intent, the obvious function and obvious purpose was to provide a means so that those who did not want to wait for forfeiture proceedings to be instituted did not have to wait. When the legislature has created a route for a person to attain a goal, it is not for courts to create other routes. Expressio unius est exclusio alterius. State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008); Georgia-Carolina Bail Bonds v. County of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 337 (Ct. App. 2003) (internal citation and quotation omitted) ("Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy."); Alcoholic Beverage Commission v. Simmons, 512

S.W.2d 585, 589 (Tenn. Crim. App. 1973) ("The liquors have thus been in the possession of the ABC in accordance with [the applicable statutes] and it appears that the proper remedy for the claimant is to follow the procedure as set out in [the statutes]."); State v. McCrary, 326 S.W.2d 473, 475 (Tenn. 1959) (a statute which "provides for the procedure to be followed" under a claim for return of seized property does not allow claimants to invent other means that bypass safeguards established in the statute.)

Moreover, it is error for courts to infer that the legislature intended the judicial branch to order seized items returned as a sanction for delay. United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 90-91 (2d Cir. 2002) (Sotomayor, J.) (unanimous). Cf. United States v. Farmer, 274 F.3d 800 (4th Cir. 2001), wherein then-Chief Judge Wilkinson wrote for a unanimous panel that the remedy when claimant properly objected to pre-trial delay was an immediate hearing on the merits of his claim to repossession. This is an entirely different remedy than the automatic re-possession and damages the present Mr. Farmer seeks.

The rule against courts inferring a legislative intent to release items seized under forfeiture statutes as a sanction for delay applies with even greater force here than it did in $557,933.89. There, then-Judge Sotomayor addressed a federal statute that required the executive branch to "promptly" institute forfeiture proceedings; it contained no provision allowing the claimant to file the civil action himself. Here, the legislature clearly intended for a claimant dissatisfied with the Government's pace regarding the instituting of forfeiture proceedings to institute the suit himself, not to sue for return of the goods without a forfeiture hearing, and not to sue for damages for the Government's failure to institute the forfeiture proceedings.

Moreover, there, the property at issue was money orders, which are usually used for legitimate purposes; here, the property is not typically used for legitimate purposes, but was properly seized under probable cause to believe it constituted the very harm against which the statutes were directed. Property ordinarily used lawfully, such as automobiles, may, in a proper case, be returned, property that is ordinarily used for an unlawful purpose may not be returned, regardless of any violation, constitutional or statutory. Trupiano v. U.S., 334 U.S. 699, 703 (1948) (overruled in part on other grounds by U.S. v. Rabinowitz, 339 U.S. 56 (1950)) (constitutional decision) (Where a still, alcohol, mash and other equipment were obtained via an illegal search and seizure, the evidence must be suppressed, but "since this property was contraband, they have no right to have it returned to them"); Ambrester v. State, 110 SW2d 332, 333 (Tenn. 1937) (illegal whiskey) (Such items need not – and cannot – be returned, "'since that would make him a criminal when he became repossessed of it.'") (quoting 56 C. J., 1251)); People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 843 (Cal. 1951) (Property such as automobiles and other conveyances "that are ordinarily used for lawful purposes, cannot be classified with narcotics, . . . counterfeit coins, [and other items] which are ordinarily used for an unlawful purpose, and are public nuisances per se.") So too here.

Here, the items have not yet been finally ruled to be contraband; but that is scarcely reason to order them returned without a showing as to whether the items are, in fact, counterfeit. Nor is there any doubt that Farmer would attempt to sell the items were they to be returned to his possession.[7]

[7] The panel quotes the Order to the effect that "'if said items are, in fact counterfeit and he attempts to traffic such items after their return, he will, again, be subject to criminal charges.'" Opinion, p. 3 (emphasis added). The formulation suggests there are two "if's"

Neither the legislature nor the constitution requires or even allows items seized as counterfeit merchandise pursuant to a valid search warrant to be returned as the result of a 66-day "delay" following the claimant's conviction for related crimes, where, as here, the legislature has specifically provided the claimant the option to be heard in circuit court.

E. Errata.

Farmer's letter to the Investigator demanded return of the items due to the dismissal of the one charge. The lower court similarly wrote, as the Court of Appeals quotes, without direct comment, that "The Sheriff's Office simply cannot hold the Plaintiff's property unless it is being held for use in a criminal proceeding." The lower court's reasoning misconceives forfeiture.

Obviously, property that has been seized solely for its evidentiary value must be returned when it is no longer needed as evidence. Not so with property that has been seized for other purposes. For example, property unobjectionable in itself may be seized as forfeitable and held because of its use in a crime – a car used to transport laundered money, for example – even if the car itself is going to play no evidentiary role in the case. State v. DeMasi, 447 A.2d 1139, 1139 (R.I. 1982) (holding that non-forfeitable property

---

("if" the items are counterfeit, and "if" he attempts to sell them.) In this case, where the Plaintiff has repeatedly declared his desire to offer the items for sale to the public, and has based his very claim on the frustration of that desire, it must be assumed that he means what he says, that he would attempt to sell them if they were returned. Thus, there is only one "if": "if said items are, in fact counterfeit." This sole remaining "if" is the question the Sheriff has consistently maintained must be resolved before any order requiring return or suit for damages.

If the items are counterfeit, Farmer's case is lost even if he did not intend to offer any returned items for sale. The statute forbids possessing with the intent to sell; Farmer clearly had the intent to sell. Farmer lost any right to the items when he attempted to sell them.

must be returned when it is no longer needed for evidentiary purposes, but forfeitable property is not to be returned).

This is especially so for contraband – unlike items such as an automobile that merely facilitated the crime, or a baseball bat used to vandalize a car. United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977) ("The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated.") (emphasis added).

Nor does a dismissal nor an acquittal on the underlying charges mandate return of the property. Snead v. United States, 217 F.2d 912, 916 (4th Cir. 1954) (finding "no merit in the contention" that a dismissal of the underlying criminal charge requires seized property to be returned without a proper forfeiture proceeding); United States v. Burch, 294 F.2d 1 (5th Cir. 1961) (acquittal does not mandate return of seized property); State v. Miller, 48 Me 576 (1859) (similar); State v. McCrary, 326 S.W.2d 473, 475-76 (Tenn.1959) (internal quotation marks omitted),

> If this had been the intention of the Legislature, (that is that the trial judge in the trial of the criminal case return the contraband to the claimant), it would have provided for the return or delivery of the liquor automatically, upon a verdict of acquittal of the crime charged.

Under Farmer's logic, one who pleads a cocaine charge down to a lesser amount than was seized is entitled to return of the surplus cocaine; one who pleads guilty to a heroin charge in return for dismissal of a cocaine charge is entitled to return of the other substance, without any hearing to determine whether the substance is, in fact, cocaine.

III. THE TRIAL COURT LACKED JURISDICTION.

S.C. Code Ann. § 39-15-1195(D) provides (emphasis added),

> (D) Property taken or detained pursuant to this section is not subject to replevin but is considered to be in the custody of the department making the seizure, subject only to the orders of the court having jurisdiction over the forfeiture proceedings.

A court must gain jurisdiction over forfeiture proceedings as described in 39-15-1195 if it is to issue any orders regarding the property. A party entitled to institute such proceedings (the Attorney General, the Circuit Solicitor, an owner, a lienholder, or the like) must institute such proceedings. That has not happened here.

Once the suit is instituted, the Court is required to determine whether probable cause existed, and if so, whether some other reason exists to return the property to the claimant. That has not happened here.

A statute expressly limiting jurisdiction over seized property does not allow claimants to invent other means that bypass safeguards written into the statute. State v. McCrary, 326 S.W.2d 473, 475 (Tenn.1959),

> Section 51-715, T.C.A. provides for the procedure to be followed under such a claim and provides that: "and the court shall not have jurisdiction to interfere therewith by replevin, injunction, supersedeas, or in any other manner except as herein provided." This quoted language is in reference and provides directly that the sole remedy of the claimant for this property is through the procedure above outlined . . . .

Alcoholic Beverage Commission v. Simmons, 512 S.W.2d 585, 589 (Tenn. Crim. App. 1973) ("the proper remedy for the claimant is to follow the procedure as set out in [the statutes]."); id., at 590 ("the trial judge was without authority to order the seized liquors returned to the defendant Simmons from whom they were taken.").

The South Carolina legislature specifically divested all courts of any jurisdiction to issue a writ of replevin as to the property. 39-115-1195(D). "Replevin at common law was an action for the return of specific goods wrongfully taken," typically employed by

tenants after landlords seized their goods to satisfy an alleged debt. Fuentes v. Shevin, 407 U.S. 67, 78-79 (1982). "If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at once, pending a final judgment in the underlying action." Id. (emphasis added). The return of contraband pending final judgment on whether the items are, in fact, contraband, is precisely the scenario the legislature sought to avoid – and divested courts of jurisdiction to produce.

IV. ISSUE PRESERVATION AND THE LIKE

A. As to the Central Holding.

Farmer had his case wrong, the opinion holds, while holding in his favor. Farmer based his action on a claimed statutory bar to his instituting proper proceedings for return of the property; it is irrelevant whether he had that option, the panel holds. Farmer's claim was statutory; he raised no constitutional claim, theory, or argument. Constitutional analysis mandates a decision in his favor, the opinion holds. This was error.

1. Specifically as to the constitutional analysis: First, even when explicitly raised by the parties, it is error to undertake constitutional analysis when every-day statutory analysis suffices. United States v. Lovett, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring); Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989); United States v. Davis, 184 F.3d 366, 371 (4th Cir. 1999). Here, every-day statutory analysis would have sufficed.

Second, the parties raised no constitutional claim, either at trial or on appeal. "Constitutional claims, including claims of due process violations in forfeiture cases, must be raised or they are waived." State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998)

(constitutional claims generally); United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 91 n.2 (2d Cir. 2002) (due process claim based on delay in instituting forfeiture proceedings). "[T]he appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).

2. More generally. The opinion holds – regardless of its constitutional rationale – that Farmer's supposed statutory inability to institute forfeiture proceedings was irrelevant. Yet Farmer had not maintained, either below or on appeal, that his claims could survive if he had the ability to institute forfeiture proceedings; his claim was exactly the opposite. It is unfair to resolve a case on a ground never mentioned by the respondent at trial or on appeal, especially where, as here, the theory conflicts with the respondent's theory of the case, and most especially where, as here, the prevailing party was the Plaintiff. Cf. I'on; Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997); Guarganious v. City of Beaufort, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995).

Moreover, here, due process concerns are in favor of the Sheriff. A defendant is constitutionally entitled to "'notice of the case against him and opportunity to meet it.'" Fuentes, 407 U.S. at 81. Yet the panel holds against the Sheriff on a theory opposite to the claim he was called upon to defend against.[8]

[8] Moreover, the decision here cannot easily be segregated into "affirmance" and "reversal." When the remanded portion, unfavorable to Farmer, comes up again on appeal, the panel will be unable to rely on its reasoning in the present case, for it cannot reverse upon grounds not raised below, I'on; and especially cannot reverse in favor of a party under an unraised ground opposite to that party's theory of the case. Yet affirming will be difficult, for the same issues and arguments generally go to both Farmer's claim for damages and his claim for return of the goods. The resulting opinion is likely to become further conflicted.

Thus,

(a) under the canon of constitutional avoidance, it is improper for an appellate court to address even properly raised constitutional claims, if statutory analysis can suffice;

(b) here, no party raised any constitutional claim, theory, or argument below, yet the Court of Appeals sua sponte launched on a due process exegesis;

(c) moreover, the Court of Appeals concluded, in deciding in Farmer's favor, that it is simply irrelevant whether Farmer had an "option" to file for return of the items under ¶ (H); whereas Farmer's case was founded on his supposedly being "statutorily barred from filing an action for the return of his inventory;" and the panel's rationale is thus in direct conflict with Farmer's theory of the case.

It was error to affirm on an unraised constitutional theory in direct conflict with the prevailing Plaintiff's theory of the case.

B. Bowen Is Not Good Law, and If Good Law, Cannot Be Extended.

Similarly, the panel remands one-half of the lower court's "reasonable compromise" for a second bite at the apple. The panel remands because "we are unable to engage in meaningful review of that portion of the appealed order." It does so based on Bowen v. Lee Process Sys. Co., 342 S.C. 232, 241, 536 S.E.2d 86, 90-91 (Ct. App. 2000).

The Court of Appeals has several times similarly relied on Bowen. The Supreme Court has never had opportunity to rule on whether that aspect of Bowen is good law. Bowen cited no South Carolina opinions in support of that holding; it relied exclusively on foreign law. That aspect of Bowen is at least in tension with this Court's repeated holdings that it is the duty of the appellant to provide a sufficient basis for review. E.g., I'on, L.L.C., 338 S.C., at 422, 526 S.E.2d, at 724 ("The losing party must first try to convince the lower court it . . . has ruled wrongly . . . .").

Take a litigant who raised two arguments to the trial court. The trial court rules against him, but its order rules directly on only one of the two arguments. If he does not promptly file a motion to alter or amend, he will be told on appeal that he has waived the second argument. It was his job to obtain a ruling on any argument on which he desires to appeal. Yet a litigant who fails to have the trial court rule on any of his arguments has waived nothing? He is sent back to have the trial court re-do that part of the order, whereupon if the trial court now overlooks an argument or two, he may then file an extensive motion to alter or amend? That seems completely unfair to all the litigants who properly filed motions to alter or amend. It seems unfair to litigants who discover too late that they overlooked the order's failure to address one of their arguments, especially if, as happens, that one argument develops into a central point as the appeal progresses. "[C]onspicuously absent from the trial judge's rulings on Farmer's private claims is any analysis," the Court of Appeals writes, Opinion, p. 7. "Without any indication as to why [the decision went against Farmer], we are unable to engage in meaningful review of that portion of the appealed order addressing his claims." Id.

Given what is at least tension between the Bowen holding and the Supreme Court's holdings, coupled with the unfairness described above, Bowen should be overruled, and a rule consistent with this Court's holdings and fair to all litigants reaffirmed.

It is especially erroneous to extend Bowen to cases such as the present. The Court of Appeals would remand one-half of the lower court's "reasonable compromise." By way of analogy, in a hypothetical case, two heirs dispute which of the two was intended by the decedent to inherit the house. Heir 1 claims to be the sole devisee of the house, and plans to live in it. Heir 2 claims to be the sole devisee, and plans to sell the house. The judge — rightly or wrongly — orders that Heir 1 is to pay Heir 2 half the appraised value, and Heir 2 is to execute a quitclaim deed. Both parties appeal. It is as if the Court of Appeals affirms that part of the order requiring Heir 1 to pay half the value, and remands that part of the Order requiring Heir 2 to execute the deed.

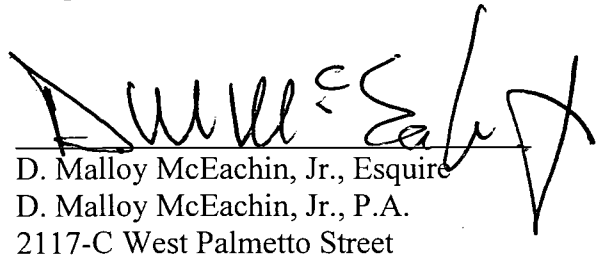
Conclusion

The Court of Appeals opinion errs on novel questions of law of great public importance. These include whether policing agencies are to institute forfeiture proceedings under 39-15-1195(C), and whether a private claimant may bypass ¶ (H) and obtain the seized items directly. The implications are broader, and concern whether private claimants may ignore legislatively-crafted means to obtain a hearing, and nevertheless obtain relief because the government was as dilatory as they were in instituting suit; whether items seized as contraband per se may be returned without a finding that they are not contraband; if the courts are to find a "return-the-contraband" requirement in the statutes as a matter of federal due process, whether sixty-six days past

conviction is an undue delay, and other issues. The opinion raises new questions regarding issue preservation, and wrongly affirms a decision for the Plaintiff under a theory that contradicts the theory advanced by the Plaintiff. The opinion below has put directly in issue substantial issues of federal constitutional law, on which it directly contradicts federal Supreme Court precedent, including the federal Supreme Court case on which it relies, and on which it directly contradicts decisions of the South Carolina Supreme Court.

For these reasons and others that may be apparent to the Court, Petitioner respectfully requests that the Court REVERSE THE DECISION OF THE COURT OF APPEALS.

Respectfully Submitted,



D. Malloy McEachin, Jr., Esquire
D. Malloy McEachin, Jr., P.A.
2117-C West Palmetto Street
Florence, SC 29501
843-665-0135

Attorney for Petitioner

EXHIBIT 1

EXTENSIVE STATUTORY EXCERPTS

STATUTORY PROVISIONS

The "'1195" Statute. The first two paragraphs of § 39-15-1195 (hereinafter, at times, "the '1195 statute") ¶¶ (A) and (B), provide generally: (A) that items bearing counterfeit marks may be seized and are then forfeit; (B) the seizure may be pursuant to a warrant, or, if probable cause exists, without a warrant. The '1195 statute further provides:

> (C) If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.
>
> (D) Property taken or detained pursuant to this section is not subject to replevin but is considered to be in the custody of the department making the seizure, subject only to the orders of the court having jurisdiction over the forfeiture proceedings.
>
> . . . .
>
> (G) When property, conveyances, monies, negotiable instruments, securities, or anything else of value is seized pursuant to the provisions of subsection (A), the law enforcement agency making the seizure, within ten days or a reasonable period of time after the seizure, shall submit a report to the appropriate prosecution agency.

[(G) (1)-(3) further details the information required to be in the report, and requires law enforcement to provide a similar report to the public, upon request.]

> (H) (1) An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter. Notice . . . must be directed to all persons and agencies entitled to notice as provided in Section 44-53-530. If the court denies the application, the hearing may proceed as a forfeiture hearing held pursuant to the provisions of Section 44-53-530.
>
> (2) The court may return a seized item to the owner if the owner demonstrates to the court by a preponderance of the evidence that the owner was not a consenting party to, or privy to, or did not have knowledge of, the use of the property that made it subject to seizure and forfeiture.
>
> (3) The lien of an innocent person or other legal entity, recorded in public records, continues in force upon transfer of title of a forfeited item, and a transfer of title is subject to the lien, if the lienholder

demonstrates to the court by a preponderance of the evidence that the lienholder was not a consenting party to, or privy to, or did not have knowledge of, the involvement of the property which made it subject to seizure and forfeiture.

The "'530 Statute." Section 44-53-530 (the "'530 statute") states, in part:

(a) Forfeiture . . . must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized. The petition must be submitted to the court within a reasonable time period following seizure . . . A copy of the petition must be sent to each law enforcement agency which has notified the petitioner of its involvement in effecting the seizure. Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure. . . .

The judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed. If the judge finds a forfeiture, he shall then determine the lienholder's interest as provided in this article.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
COURT OF COMMON PLEAS

The Hon. Ernest F. Kinard, Jr. Circuit Court Judge

Opinion No. 4752
(S.C. Ct. App. Filed October 13, 2010)

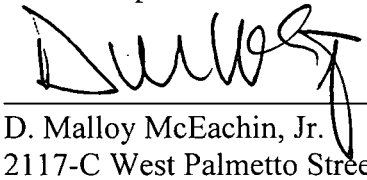
James David Farmer, ... Respondent

v.

Florence County Sheriff's Office,..... Petitioner

CERTIFICATE OF COUNSEL

The undersigned certified that this Petitioner's Brief complies with Rule 211(b), SCACR.



D. Malloy McEachin, Jr.
2117-C West Palmetto Street
Florence, SC 29501
(843)665-0135
Attorney for the Petitioner
843-665-0135

Florence, SC
July 13, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
COURT OF COMMON PLEAS

The Hon. Ernest F. Kinard, Jr. Circuit Court Judge

Opinion No. 4752
(S.C. Ct. App. Filed October 13, 2010)

James David Farmer, ... Respondent

v.

Florence County Sheriff's Office,..... Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Brief and Appendix in the above-referenced matter was served on all counsel today by placing a copy in the United States mail, postage prepaid, addressed to:

Patrick J. McLaughlin, Esq.
Wukela Law Firm
PO Box 13057
Florence, SC 29504
843-669-5634

And to:

David M. Pascoe, Esq.
Solicitor's Association of South Carolina
PO Box 11251
Columbia, SC 29211-1251

Tiffany D. Munn
McEachin & McEachin, P.A.
2117-C West Palmetto Street
Florence, SC 29501
843-665-0135

Florence, SC
July 13, 2012

McEachin & McEachin, P.A.

Attorneys-At-Law

2117 W. Palmetto Street, Suite C
Florence, South Carolina 29501

D. Malloy McEachin, Jr.
FitzLee H. McEachin

Phone: 843.665.0135
Facsimile: 843.665.0716

July 13, 2012

The Hon. Daniel E. Shearouse
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: **James David Farmer, Respondent, v. Florence County Sheriff's Office, Petitioner**
Appellate Case No. 2011-18326

Dear Mr. Shearouse:

Please find enclosed:

1. An original and sixteen (16) copies of the Petitioner's Brief along with the Certificate of Counsel;

2. Thirteen (13) additional copies of the Appendix previously filed; and

3. The original and one (1) copy of the Certificate of Service on all counsel.

Please return a stamped copy of the brief and certificate of Service in the enclosed envelope.

As always, should you have any questions, please do not hesitate to contact me.

With kind regards, I am,

Yours very truly,

D. Malloy McEachin, Jr.

Cc: Mr. Patrick J. McLaughlin, Esquire
Mr. David M. Pascoe, Jr., Esquire