THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

OCT 10 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.

REPLY BRIEF OF PETITIONER

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

Attorney for Respondent

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

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OVERVIEW

Respondent's Brief barely attempts to defend the reasoning of the Court of Appeals panel on any of the issue. Instead, Respondent provides a long line of reasons he believes the result should be affirmed. If these had any merit, they would be reasons to modify the panel's decision and remove the dangerous precedents. However, they lack all merit, and the decision below should be REVERSED.

I. RE: SECTION I OF THE PARTIES' BRIEFS (The Panels' Holding That Sheriffs Are Required To Institute Paragraph (C) Civil Proceedings)

A. Respondent Fails To Address The Contradiction In The Panel's Opinion.

Part I(A) of the Sheriff's Brief addressed the opinion's self-contradiction in holding that only the Attorney General, the Circuit Solicitor, or their designee may institute Paragraph C proceedings to determine whether seized items are to be returned to the claimant, and that the Sheriff must do so. Specifically, the panel held that Section 44-53-530 of the South Carolina Code prohibits anyone except the Attorney General, the Circuit Solicitor, or their designee to institute a Section 39-15-1195, Paragraph (C) proceeding. Op. pp. 5-6. It nevertheless then held that the Sheriff's Office has a "statutorily mandated responsibility" to do so. Id., p.7. Yet, the Sheriff's office is not the Attorney General, is not the Circuit Solicitor, and was not designated by either to bring such proceedings. The Respondent's Brief, in Part I(A), purports to argue that there is no contradiction. Yet not a single point among the many the Respondent, James David Farmer, raises actually addresses that contradiction.

The arguments Farmer does offer fail. He errs in arguing that the question of whether the panel opinion contradicts itself is not preserved. The question of whether Section 44-53-530 of the South Carolina Code applies to prevent Farmer from applying for a Section 39-15-1195(C) hearing was not raised by anyone until the Court of Appeals panel based its decision on the

question. From the day the Court of Appeals raised the question, the Sheriff has been adamant that an appellate court may not decide in favor of Farmer on that ground. Certainly replying to an argument as soon as it is raised suffices to preserve the issue.

More generally, Farmer's complaints here and elsewhere in his Brief about supposedly faulty issue preservation by the Sheriff ignore the fact that Farmer's arguments in this case have been mutating as the case proceeds. Farmer's Complaint did not even cite Paragraphs (C) or (H), on which his case now centers. It fell to the Sheriff to point out, in the Sheriff's Memorandum opposing Farmer's motion for summary judgment, that it was Paragraph (C) on which Farmer had to rely. Farmer's Complaint rested instead on Paragraph (D) for his claim that he was barred from instituting forfeiture proceedings. Yet Farmer no longer mentions Paragraph (D) except when forced to. His more recent filings stay as far as possible from that paragraph. That paragraph does not forbid an owner from instituting proceedings to determine whether the property is forfeit; rather, it forbids an owner from doing what Farmer attempts to do here. Farmer instead now rests his claim on what he sees as a flaw in Paragraph (H) – a paragraph he did not even mention in his Complaint or his other filings with the circuit court; on his agreement with the Court of Appeals' analysis that Section 44-53-530 precludes Farmer from bringing a Paragraph (C) application, a claim that was unraised until the panel raised it sua sponte; and on the claim that due process concerns negate any impact of Paragraph H, another claim he never raised and which was raised by the panel sua sponte. As Farmer's theory of his case has evolved over time, so have the Sheriff's responses. A Plaintiff whose theory of the case shifts and turns as often as Farmer's does may not attempt to lock his opponent into the Defendant's responses to his earlier theory; he may not claim foul when new counter-arguments are raised to address the

new theory(ies) of the case. Especially where, as here, the new theories contradict the Plaintiff's earlier theories.

Farmer similarly complains that the Sheriff's Office has waived any argument about the contradiction because the Sheriff's Office admitted that Paragraph (C) is a "directive to law enforcement." Indeed it is, but law enforcement clearly includes circuit solicitors and the Attorney General, who is the chief law enforcement officer in the state.

Farmer argues, Br., p. 5, that the relevant statute imposes other duties on the Sheriff. Yet these other duties do nothing to negate the contradiction in the panel's holding that as only certain entities, which do not include the Sheriff's office, may bring a Paragraph (C) application, that the Sheriff must bring such an application.[1]

The Sheriff further argued that the panel's opinion conflicts with the plain language of the statute, the obvious legislative intent, and common sense. In response, Farmer, who admits dealing in pirated goods, musters only one argument. That argument is both erroneous and irrelevant. Section 39-15-1195 "as a whole," he maintains, is "intended to protect property owners and their property." Resp't Br., p. 9 (emphasis deleted). He errs. As a whole, the statute is designed to protect the public, both producers and consumers of trademarked goods. Moreover, even if the statute's various provisions are designed to balance the interests of producers and consumers and owners, to whatever extent one goal is "to protect property owners," that is simply not a reason to misread the other goals or to misread the means by which the statute directs those goals be pursued.

[1] If anything, under the principle of expressio unius, see, e.g., State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008), the listing of certain duties would mean the exclusion of others; thus the listing of the duties Farmer cites as explicitly mandated by the statute would preclude a reading that the statute intended to impose a duty on the Sheriff to institute Paragraph (C) proceedings.

B. Respondent's Argument Regarding "Special And Important Reasons" Proves Petitioner's Case.

The Sheriff's Brief noted several issues of great public importance inhering in the panel's opinion, questions of substantive constitutional and statutory law, and of issue preservation. Specifically concerning the panel's holding that Sheriffs have a statutory duty to institute forfeiture proceedings under Section 39-15-1195(C) of the South Carolina code, the Sheriff pointed out that the holding contradicted the plain language of the statute, the legislative intent as reflected in the statutory scheme as a whole, and common sense. Under both the specific provision, 39-15-1195(C), and the broader regulatory scheme created by the legislature, agencies with special expertise in searching, seizing, and arresting were to search, seize, and arrest, and agencies with special expertise in practicing law were to handle the resulting civil suit. That made sense, the Sheriff argued. The statute as rewritten by the panel makes no sense, and contradicts the plain language of the statute and legislative intent, as the Sheriff explained in his Brief. Finally, the Sheriff pointed out, the new scheme created by the Court of Appeals would be especially onerous to smaller policing agencies that lack an attorney on staff.

Farmer's brief ignores the first two points. He focuses only on that final point: that the decision will be especially onerous to smaller policing agencies which have no lawyer on staff and may find it difficult to afford outside counsel. Even on this sole point to which he responds, he multiply errs. Farmer maintains, first, that the smaller agencies will not face difficulties, because larger agencies have attorneys on staff. Resp't Br., p. 10 (arguing that smaller policing agencies will not be hurt because agencies like the Florence County Sheriff's Office have lawyers on staff). He misses the point. It is as if one argues, "X will injure small dogs," and her

opponent responds, "That is not true, because X does not injure Great Danes or German Shepherds."[2]

Farmer argues, next, that smaller agencies can have the Solicitor's Office represent them. That should cure the problem, he argues. Farmer has the analysis backwards. It is because solicitor's offices and the Attorney General are better equipped to handle such matters than are policing agencies that the legislature placed the duty to bring such civil actions on solicitors' offices and the Attorney General. The Sheriff agrees that solicitors' offices may represent sheriffs in many, many kinds of matters. The Sheriff further agrees that solicitors' offices may represent the State in the specific matter of forfeiture. The Sheriff agrees that having solicitors' offices handle the matter cures the problem. So does the Legislature. That is why it mandated that solicitors' offices and the Attorney General bring these cases directly, in their own right.

More generally, Farmer's argument about in-house counsel and the Florence County Sheriff's ability to afford outside counsel is simply irrelevant. The Sheriff's argument was the impact of the panel's decision on other policing agencies, specifically, smaller agencies. The Florence County Sheriff did not claim that his department was one of the smaller departments in the State. Nothing Farmer has argued negates here in any way or to any degree the burden that would be placed on smaller policing agencies were the panel opinion to stand uncorrected.

[2] Moreover, in maintaining that the Florence County Sheriff's Office "has" in house legal counsel, Resp't Br., p. 10, Farmer overlooks the fact that during the relevant time frame, the Florence County Sheriff had no in-house legal counsel. In maintaining that the Florence County counsel represented the Sheriff "in addition to in-house counsel," Respondent again errs: the Sheriff turned to Florence County's counsel instead of, not in addition to, in-house counsel, because it lacked in-house counsel. Similarly, Respondent notes that website evidence indicates that Capt. Mike Nunn is the "Public Info/Legal Counsel" for the Sheriff's Office. Resp't Br., p.10 n.1. That he is, but neither he nor anyone else was Legal Counsel during the time in question.

II. RE: SECTION II OF THE PARTIES' BRIEFS (The Holding That Due Process Concerns Indicate That A Proper Remedy For The "Delay" Is Return Of The Items)

Farmer attempts barely, if it all, to support the panel's rationale. Instead, he presents a series of arguments he suggests this Court adopt in order to rescue the panel's result. He errs.

A. Farmer Attempts Barely, If At All, To Support the Panel's Rationale.

The panel reasoned that "due process concerns" justify return of the seized items without a hearing as to whether they are counterfeit, where the statute provides the claimant "only" an "option" to be heard. The Sheriff's Brief discussed at some length why this is in error. Farmer, perhaps wisely, does little or nothing to support this reasoning.

1. Re: The Cases Cited by the Panel.

The panel cited three cases in its sua sponte discussion of due process: United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983); United States v. $62,972 in United States Currency, 539 F. Supp. 586 (D. Nev. 1982); and Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981). As explained in the Sheriff's Brief, the panel's opinion directly conflicts with these specific cases and due process doctrine generally. Those cases stand for the proposition that where a claimant to seized property is denied the option to be heard by a court, due process concerns may arise, but where the claimant is afforded the option to be heard, no due process issue exists.

Farmer's Brief does not even mention Moore, the sole South Carolina Supreme Court case cited by the panel. Regarding the federal district court case, $62,972, he writes only that the Sheriff overlooked the context in which it was cited, without stating what he believes the context to be. As to the final case, the federal Supreme Court decision in $8,850, Farmer similarly argues that the Sheriff overlooks the context, and more specifically states his view that the case was not relied on as authority for the panel's proposition that due process concerns are at issue. (The Sheriff "overlooks the context in which [$8,850 was] cited." Resp't Br., p. 14. Farmer

argues that $8,850 "was cited specifically **after** the Court of Appeals noted their belief that S.C. Code Section 39-15-1195(C) was included by the General Assembly to address due process concerns." Id. (emphasis is Farmer's)).

2. State Law Grounds.

Farmer argues, instead, that the South Carolina courts and the South Carolina legislature have the power to afford their citizens greater constitutional rights (courts) and greater statutory rights (legislature) than the federal constitution demands. The Sheriff agrees. However, neither body did so here.

Due Process – State Constitutional Grounds. State courts, the Sheriff agrees, especially state supreme courts, may interpret their state constitutions to provide greater protection than do even virtually identical clauses of the federal Constitution under federal Supreme Court holdings. See, e.g., Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). A state supreme court is, by definition, the ultimate interpreter of the state constitution. Id. This undisputed principle of law does not assist Farmer. The Supreme Court of South Carolina has never indicated there is any difference between the state and federal constitutions regarding the right to a hearing concerning confiscated property. Rather, the Court has treated analysis of the two identically-worded provisions interchangeably. E.g., State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 525 S.E.2d 872 (2000) (in the context of a due process right to a hearing, incorporating its analysis of the state constitutional clause in Myers v. Real Property at 1518 Holmes Street, 306 S.C. 232, 411 S.E.2d 209 (1991) into its analysis of the federal clause); Myers, 306 S.C. 232, 411 S.E.2d 209 (incorporating its analysis of the federal constitutional provision in Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981) into its analysis of the state provision).

Moreover, as explained in more depth in the Sheriff's Brief, the South Carolina Supreme Court's analysis of the role of due process in these situations is identical to the federal Supreme Court's analysis of the federal clause. See, e.g., 192 Coin-Operated Video Game Machs., 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (emphasis added) (quoting Moore) ("The most due process requires is [an] 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.'"); Myers v. Real Property at 1518 Holmes Street, 306 S.C. 232, 236, 411 S.E.2d 209, 212 (1991) (quoting Moore) ("A [due process claim] 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.").

Due Process – Statutory Grounds. The Sheriff does not doubt that a legislature may, by statute, provide its citizens more protection than the constitution demands. The Sheriff does not doubt that – at least for property that is not illegal in and of itself[3] – a legislature could, if it wished, declare that a delay in instituting forfeiture proceedings will require return of property. The legislature has the power to do away with statutory forfeiture altogether, by repealing the statutes; it would seem to follow that the legislature could limit those statutes so as to require immediate return of the property, if it so wished.

The initial question here is not whether the legislature had the authority to direct such a result; the question is whether it intended such a result. More specifically, assuming, for the sake of argument, that a legislature could properly mandate that courts order the return of property that it is illegal to possess, thus placing sheriffs in the position of making criminals out of those

[3] Whether the legislature may, by statute, direct judges to direct police and sheriffs to return heroin or similar items is another question. It would be illegal for the "owner" to accept possession of the items. There may be real separation of powers concerns in one branch of government directing a second branch to order a third branch to facilitate a violation of the law. Under the doctrine of constitutional avoidance, see, e.g., Clark v. Martinez, 543 U.S. 371, 385 (2005), the Court should avoid a reading of the statute that would raise such problems, and hold that the statute was not intended to require the return of contraband.

who are to receive the illegal-to-possess property, and placing courts in the awkward position of ordering policing agencies to cause the recipients to violate the law, why would it do so?

Other than its erroneous reliance on federal case law and the Moore decision, the panel offers not one bit of analysis or legislative history for its "belief" that the legislature had due process concerns in mind.

Regardless of the source—federal or state, legislative or constitutional— the panel's rationale is "due process concerns." What is this "due process concern?" The only due process concern remotely at issue here is the "opportunity to be heard." To accept Farmer's suggestion, one would have to conclude that either the State Constitution provided or the legislature found a "due process concern" in . . . in what, exactly? In having someone else institute a proceeding to raise issues that a claimant may raise himself, simply by applying to the court? That hardly rises to the level of a due process concern.

Farmer offers not a single case wherein it was found that the remedy for a statutory violation of a command to institute forfeiture proceedings is the return of the items without a hearing. Cases that have employed that drastic remedy are almost invariably cases finding a constitutional violation. Indeed, as discussed in the Sheriff's briefs, many courts deny the remedy of declaring the government in default even where a constitutional claim is proven. The Court should follow the lead of now-Justice Sotomayor, who explained for a unanimous panel in United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 90-91 (2d Cir. 2002), that it is error to infer the legislature intended the return of property as a remedy for a delay by the government in seeking a hearing. Legislatures simply do not intend that remedy when they go above the constitutional floor in providing by statute that the government "promptly" institute forfeiture proceedings, as in the statute at issue there. Id. Even more so where, as here, the

item(s) did not merely facilitate the crime, such as an automobile used as a get-away car, but are instead at the core of the crime itself. And even more so where, as here, and unlike there, the statute provides the claimant the statutory right to begin the proceedings himself.

B. Farmer's Remaining Arguments Fail.

Farmer is not done. He has a parade of arguments that he maintains merit affirmance.

1. Farmer's Attempts to Expand Certain of the Panel's Statements into Holdings Fail.

Farmer raises three points that were mentioned by the Court of Appeals, but were not relied on by that Court. They were not part of the ratio decidendi. Farmer in effect asks this Court to affirm the panel decision as modified, by negating its central and broad holdings regarding the meaning of the statute and of due process. None of these points can carry that burden – nor could they even were they accurate, which they are not.

(1) The panel's assertion, cited by Farmer, that the Sheriff's Office has not provided "any concrete reasons" to justify its refusal to return the property is accurate only if one considers "not concrete" the Sherriff's arguments (a) the items were seized pursuant to a warrant under probable cause that the items are contraband; (b) that the evidence is, in the Sheriff's view, overwhelming that the items are in fact contraband; (c) that there has been no judicial determination that the items are not, in fact, contraband; (d) that such items should not be ordered to be returned without such a finding; (e) that the Sheriff believes he should not return such items absent such an order following such a hearing; (f) that the statute does not allow for such an order without such a hearing, and (g) that the proper procedure is for a ¶ (H) application to be filed by Farmer, or a ¶ (C) proceeding filed by the solicitor, so as to begin the proceedings to determine, on the merits, whether the items are to be returned or are instead forfeit.

Perhaps the panel confused the proceeding below with a forfeiture proceeding. At such a proceeding, the Sheriff might be required to present concrete evidence that the items in question are counterfeit. He would be eager to present that evidence. It was precisely to avoid such evidence that Farmer asked to receive damages and to have the items returned without any such evidence being presented and without any such hearing being held.

It has consistently been the Sheriff who has argued the importance of such an evidentiary hearing.[4] It has consistently been Farmer who has sought to avoid such a hearing.

(2) Similarly, the panel's assertion that the Sheriff has offered no reason for its "delay" in instituting forfeiture proceedings is accurate only in the literal sense that the Sheriff never specifically argued he was entitled to "delay" filing such civil proceedings; he argued he was not required or authorized to file such proceedings at all. As discussed in the Sheriff's Brief, the panel agrees with this point, as a matter of logic: it holds that only the Attorney General, the Circuit Solicitor or their designee is authorized to institute such proceedings. It then holds that the Sheriff was authorized and required to institute such a proceeding.

Perhaps the panel is continuing its unfortunate $8,850 and $62,972 analysis. The $8,850 decision held that the reasons offered for executive branch delay in instituting forfeiture proceedings is a factor to consider in determining whether a due process violation has occurred, where the statute prevents the Claimant from applying directly to the court for a hearing to determine whether the items are forfeitable. The $62,972 case held that return of the property without a hearing was a suitable remedy for such a due process violation (again, where the

[4] The Florence County Sheriff's Office no longer possesses the questioned goods. Expert testimony of an inspection of the goods prior to seizure as well as photographs taken post-seizure will support a finding that the goods were counterfeit at an evidentiary hearing.

Claimant had been unable to directly request a court to hold a hearing on the forfeitability or non-forfeitability of the items).

(3) Again similarly, the panel, and now Mr. Farmer, complain that the Sheriff's Office maintained that it "'need not provide any reason whatsoever to hold lawfully seized goods beyond the fact that a warrant had been issued for the seizure.'" The panel seized on a "for the record" paragraph the Sheriff put in his brief so as not to have Farmer claim, on remand, that the Sheriff has waived the point. The Sheriff wrote, in his Brief to the Court of Appeals, Appellant/Respondent's [Sheriff's] Final Br., p. 8 (emphasis added),

> Further, and in an abundance of caution, the Sheriff's Office states that it does not agree that even under Section 39-15-1195(H) it would be proper to inquire as to the reason law enforcement is not returning the goods, other than the fact that the goods are properly subject to seizure and not properly for return. Whether the Sheriff is keeping the goods for sale, to demonstrate common types of counterfeiting, etc., is simply not for the lower court's determination.

In short, the Sheriff argued that the only inquiries should relate to the criteria specified by the statute. The panel, and now the Respondent, seize on this as if it were remarkable. The panel did not base its decision on this claim of a theoretical right to refuse information; but if it in fact had done so, it clearly erred, as no refusal was at issue here. Neither Farmer nor the trial judge ever asked the Sheriff why he was holding the items. The Sheriff never refused to explain why he was holding the items.[5]

2. Farmer's Attempts to Otherwise Justify the Result Fail.

[5] In fact, he did explain: he was ordered to seize the items; he believes the items to be contraband; he believes he is not to return items that were seized under probable cause and which he continues to believe to be contraband, unless and until a hearing is held to determine whether they are, in fact, contraband.

The time to explain reasons, beyond the existence of a legitimate warrant, duly issued by a magistrate judge, for holding the items that the magistrate ordered the Sheriff to seize, is at a forfeiture hearing, as authorized by 39-15-1195 (H) if the claimant wishes to institute such a proceeding, or 39-15-1195 (C) if the claimant is willing to wait for the Attorney General or Solicitor to institute such proceedings.

Farmer's argument re: the time since the plea bargain is erroneous and irrelevant.

Farmer's central concern in his Section II appears to be to establish that the length of the "delay" sufficed to warrant the extreme remedy of ordering the items returned without a proper forfeiture hearing. He claims that the 128 days between his conviction of certain intellectual-property crimes and the plea-bargained dismissal of certain related charges, on the one hand, and the institution of statutory proceedings, on the other, mandates a return of the items to the admitted pirate without a judicial determination as to whether the items are, in fact, counterfeit.

- At the most basic level, the entire question of a delay imposed by the executive branch is simply irrelevant unless the executive branch's delay prevented the claimant from having a hearing. No such claim can be made here, where the statute itself authorizes the claimant to apply directly to the court for a hearing. Second, Farmer errs in claiming the relevant period is 128 days. Farmer wrote the Sheriff's investigator on March 19, 2008, 56 days after the January 23rd conviction/dismissal, stating that Farmer himself would be applying to the circuit court for return of the property if the items were not returned within ten days. That makes 66 days. It is not the Sheriff's fault if Farmer thereafter delayed. Farmer's letter entitled the recipient to think that Farmer planned to bring the matter to the circuit court more quickly than the executive branch desired to, and to leave the matter in Farmer's good hands. Third and finally, even the 128 days that Farmer claims are woefully short of any sort of extreme delay that could remotely justify the extreme remedy that Farmer demands. Rather, it is well within the normal processing time of a year or more, as discussed in the Sheriff's Brief, at 23. That amount of time is not a "delay," let alone an unusual or extreme delay.

Moreover, as also explained in the Sheriff's Brief, at 25, delays of even longer duration simply entitle the claimant to demand that a forfeiture hearing or similar hearing be held soon.

Such delays do not entitle the claimant to the extreme remedy of return of the disputed items. They simply entitle the claimant to demand that a hearing be promptly scheduled to answer the question of whether the items are properly forfeit or are instead to be given to the claimant.

Farmer similarly errs in claiming that time should be computed from the date of his plea up through the filing of his Brief of Respondent. Had any executive branch agency filed for a Paragraph (C) hearing after the filing of the Notices of Appeal, Farmer would be complaining that the filing of a Notice of Appeal stays all matters that are affected by the appeal, Rule 241, SCACR; and his demands for damages for the "delay" and for return of the items are affected by the appeal. Moreover, once the circuit court issued its order, unless and until the Order is reversed, any filing request for a forfeiture hearing would be moot, as the judge had already ordered the items returned.

Farmer again similarly errs in claiming, Resp't Br., p. 17, that the Sheriff's Office waited over 2 years and 2 months "to even bring up the need for a forfeiture hearing." The Sheriff has argued from the beginning that the items may not be returned without a proper hearing on the question of whether they are forfeitable. He has consistently argued that the proper process is to have such a hearing.

More generally, Farmer's failure to appreciate the simple concept that he had the opportunity to be heard if he chose to take advantage of it leads to a series of misconceptions.

- Farmer's extensive argument regarding the four-factor test of Barker v. Wingo, 4017 U.S. 514 (1972), cited in $8,850, is irrelevant. He argues that the importance of $8,850 is its application of that Barker test. That is the only use Farmer sees for any of the three cases on which the panel centrally relied. However, the Barker test applies in forfeiture cases only where

the claimant has no means to procure a hearing other than for the executive branch of Government to bring the matter before a court.

- Rather, the only relevance of $8,850 to the present case is its insistence that – even where one must rely on the executive branch to institute the proceeding – one must not sleep on one's right to a hearing, and then demand damages or return of the contraband as a penalty for the delay. One must first have done what one can to obtain a hearing.

Farmer claims he did not sleep on his rights, but demanded, twice, that the Sheriff return the items without any hearing (pp. 13-14). He further argues (p. 13) that he asserted his right by going to court and demanding that the Sheriff pay damages for delay in returning the goods, again without any hearing as to the forfeitability of the goods.

He misses the point. Nowhere in the federal cases does a court say that such constitutes sufficient attempts to assert one's rights. It is only after the claimant has repeatedly requested of the executive branch that it schedule a hearing on whether the items are properly forfeitable, and been refused for a significant time, that courts even entertain the idea of ordering items returned without conducting a hearing into the merits of the forfeiture claim. The point the federal courts are getting at is that one must do what one can to obtain a hearing on the merits of whether the property is forfeitable, and be denied that hearing, before one can assert any due process violation for which the remedy is return of the items or damages.

Farmer errs in claiming that Paragraph (C) proceedings are needed to avoid a flaw in Paragraph (H) of Section 39-15-1195. Paragraph (H) of the '1195 statute provides only for an inadequate hearing, Farmer maintains. Resp't Br., p. 11. That, he writes, is why he has been demanding a hearing pursuant to Section 44-53-530. (That is, a proceeding under Paragraph (C) of the '1195 statute, which proceeds pursuant to Section 44-53-530.) Farmer claims to have

consistently argued the point below. The only reference to this argument in any of his filings with the courts below is in his Respondent's Brief to the Court of Appeals, Respondent's Final Brief of the Respondent/Appellant, filed with S.C. Ct. App. Mar. 13, 2009. On page 7 of that earlier brief he explains that the problem he sees in Paragraph (H) is, "[s]pecifically, the statute requires an owner may have the property returned if the owner can demonstrate that he/she 'was not a consenting party to, or privy to, or have knowledge of the use of property that made it subject to seizure and forfeiture.'" Id. (quoting S.C. Code § 39-15-1195(H)). He thus insists that he is entitled instead to a hearing pursuant to Section 44-53-530.

However, Section 44-53-530 leads to exactly the same place. Section 44-53-530 itself provides no guidance as to the standard to be employed in determining whether the property is subject to forfeiture. (It says only, "The judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed.") For that, a judge would look to Section § 44-53-586, for it is part of the same statute. That section declares, in § 44-53-586(b)(1), that an owner may have the property returned if the owner can demonstrate by a preponderance of the evidence that he/she "was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture." This is exactly the language he complains about in Paragraph (H). Has this entire case been brought so that Farmer can face identical language under Section 44-53-530, rather than under Paragraph (H) of the '1195 statute? Or, as Farmer has demanded since he first filed, that he is entitled to return of the items without a hearing due to some great variance between the two statutes? [6]

[6] Moreover, (a) what he is asking for here is an affirmation as modified. His argument that there is an important difference between hearings under the two provisions directly conflicts with the Court of Appeals' holding that it does not matter whether he could have applied for a hearing on the merits under Paragraph (H).

(b) His argument that a Paragraph (H) hearing would preclude return of property to an innocent owner who offered legitimate, non-counterfeit for sale is without merit. If the items were not counterfeit, then there was no use of the

Farmer errs in claiming that the Sheriff is trying to have things both ways. On pages 11-12 of his Brief, and sporadically throughout that document, Farmer argues repeatedly that the Sheriff is "trying to have things both ways" by arguing that there must be a hearing to determine whether the items are forfeit, and arguing that he believes Farmer would lose at any such hearing. Farmer's argument is frivolous. There is nothing contradictory about arguing that one's opponent must submit his claim for proper consideration, and that he believes the opponent will not prevail when the claim is properly considered. Farmer, instead, seeks to sidestep that hearing and obtain the items directly.

The Court should reject Farmer's suggestion that it affirm on grounds that the Court of Appeals ruled that a forfeiture hearing had been held. Farmer argues, Resp't Br., p. 26, that the trial court may have, in fact, treated his Complaint as a motion for a forfeiture hearing under Paragraph (H) of the '1195 statute. Neither court below gave any indication that such was the case, but if the either court in fact did so, it clearly erred, for the circuit court asked none of the questions and made none of the findings required for a forfeiture hearing.

C. Re: All Arguments In Section II Of Respondent's Brief.

Whatever tiny interest there is in one having the other party file for a hearing that he may himself file for is far too weak a reed to support a wholesale return of seized items without a hearing as to their forfeitability. This is so regardless of whether one labels the interest a "due process" concern or other concern.

It is as if a statute in another state requires the police, at the conclusion of an inmate's sentence, to unlock and open the cell door. The same statute provides that once the sentence has run, the inmate may himself open the door. When Inmate Doe's sentence is over, the officer

---

items that made them subject to forfeiture, and the claimant could thus easily show that he had no knowledge of any use that made them subject to forfeiture.

unlocks the cell door, but does not open it. Rather than open the door himself, the inmate sits in his cell, saying, "I don't have to open this door. The police have the duty to open the door." He sits there for a week, and then sues for damages for false imprisonment or the like under state law, or under federal Section 1983.

Such a suit should be thrown out of court. His damages are not a week of incarceration. His damages are a failure to have someone else open a door for him, a door he is free to open himself. The damages are on the order of ten cents, not tens of thousands dollars.

So too under the present statute. If any damages are brought about by the executive branch's declining to timely institute forfeiture proceedings, causing the claimant to have to file for the hearing himself, those damages are the filing fee and whatever small amount of time the claimant's attorney properly incurred in preparing the Paragraph (H) petition. [7]

Another way to put it: The claimant had a duty to mitigate. He could have mitigated by saying, "I will pay the filing fee myself, because I am in a rush to get this started." There is simply no supporting the idea that the injury of having to file suit, or to file an application, is so great that one should in effect automatically be declared the victor. Yet Petitioner asks the courts to declare him, in effect, the victor of the forfeiture hearing, and order the items returned, simply because he had to file at his convenience, rather than having the matter filed by the executive branch at its convenience.

III. RE: SECTION III OF THE RESPONDENT'S BRIEF (Statutory Analysis)

Farmer's arguments in this section of his Brief have been dealt with elsewhere in this Reply. The rebuttals will not be repeated here.

[7] For the record, the Sheriff does not agree that even the filing fee is compensable as damages. Attorney fees and costs are not usually considered "damages" under South Carolina law. Moreover, the Sheriff refers as well to federal cases cited in his Brief and in this Reply, which stand for the proposition that the remedy, when a claimant brings suit alleging delay on the part of government in instituting forfeiture proceedings, is to order the executive branch to promptly initiate those proceedings. Those cases do not generally mention any award of filing fees to the claimant.

IV. FARMER MISUNDERSTANDS THE NATURE AND PURPOSE OF FORFEITURE

In Farmer's initial letters to the Sheriff's investigator and sporadically resurfacing in his latest Brief is the idea that dismissal of a criminal case mandates return of any items seized in relation to that case. Such a view is completely erroneous. In that view, if a defendant is arrested with two white powders in his possession, is charged with possession of heroin and with possession of cocaine, and pleads to possession of heroin in exchange for the cocaine charge being dismissed, he is entitled to return of the cocaine.[8] If a defendant is arrested for possession of an automatic weapon, and the charge is dismissed on some technicality, he does not get the weapon back. Similarly if the Sheriff's office, pursuant to a lawful search, finds a bomb in a house. Moreover, even if a bomb is found and seized pursuant to an unlawful search, the bomb is not returned. The use of the bomb as evidence may be suppressed; the resulting lack of the crucial evidence may cause the solicitor to dismiss the case, but the bomb is not returned.

Directly on point is the United States Supreme Court's decision in Trupiano v. United States, 334 U.S. 699 (1948), cited in Petitioner's Brief at 26. Pursuant to a grossly unconstitutional search, authorities found an illegal still, alcohol, mash, etc. The state was not allowed to introduce the items into evidence, but the defendants "have no right to have it returned to them." Id., at 703. See also other cases cited there. The South Carolina Supreme Court has not to Petitioner's knowledge ever addressed the issue of whether contraband is to be returned when a criminal case is dismissed. Petitioner respectfully suggests that this Court adopt the sensible opinion of the Federal Supreme Court, and hold similarly.

---

[8] The analogy can be even more closely on-point, at the cost of becoming more complex. Assume that the defendant above maintains that the second powder was not cocaine, but was some inert substance. Is he entitled to return of that powder, without a hearing to determine whether it is, in fact, cocaine? Assume further that he was initially charged with possession of a greater quantity of heroin than he pled guilty to possessing. Is he entitled to return of the excess heroin? After all, the charge that he possessed more than X grams of heroin has been dismissed.

V. THE CIRCUIT COURT LACKED JURISDICTION

Farmer sued under Section 39-15-1195. As explained in the Sheriff's Brief, that section does not provide circuit courts the jurisdiction—indeed, it explicitly denies jurisdiction—to do what Farmer asked the circuit court to do here.

A. Farmer complains, first, that lack of jurisdiction was not previously raised. However, this question may be raised at any time. In re Matthews, 345 S.C. 638, 550 S.E.2d 311 (2001); Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001); Ex parte South Carolina Dept. of Revenue, 350 S.C. 404, 566 S.E.2d 196 (Ct. App. 2002).

B. Farmer complains, second, that another statute, using other phrasing, employs the word "jurisdiction" in a geographic sense to mean "county." He filed his complaint in the proper county, he argues; therefore, he concludes, the lower court had jurisdiction. He errs.

The word "jurisdiction" has a meaning that is geographic; that meaning refers to a territory or physical area. It has another meaning that refers to authority to decide a case or issue a decree. BLACK'S LAW DICTIONARY 855 (7th ed. 1999) provides meanings of the word "jurisdiction," and specifically distinguishes "A court's power to decide a case or issue a decree" from "A geographic area within which [such] authority may be administered." See also www.Dictionary.com (similarly distinguishing the word's meaning of "the right, power, or authority to administer justice by hearing and determining controversies" from an alternative meaning of "the territory over which authority is exercised").

The statute to which Farmer refers, S.C. Code Ann. § 44-53-530, clearly uses the word in the geographic sense of a physical location. It references "the court of common pleas for the jurisdiction where the items were seized" (emphasis added). The use of the word "where" is a clear indicator that a geographic sense is intended. Not so § 39-15-1195, the statute at issue here.

It uses the word in the sense of "the right, power, or authority to administer justice by hearing and determining controversies." It provides,

> (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.

The use of the word "proceedings" is a clear indicator that a non-geographic meaning is intended. Paragraph 39-15-1195(D) does not state, "the court having jurisdiction over the county where the forfeiture proceeding take place." It does not state, "the court having jurisdiction over the county where the items were seized." It explicitly declares the type of jurisdiction it contemplates: jurisdiction over the forfeiture proceedings. A court may obtain jurisdiction over the 39-15-1195 forfeiture proceeding by one of two means. The Attorney General or the Circuit Solicitor may file, or may designate another to file, for forfeiture proceedings under 39-15-1195 (C). A private claimant may apply under 39-15-1195 (H). Unless and until one or the other requests that the court take jurisdiction over such proceedings, the statute declares, no court is authorized to subject the property to any orders.

Under the principle of expressio unius, the provision of means for return of the property, via Paragraphs (C) and (H), would suffice to negate other statutory routes. See, e.g., State v. Bolin, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (quoting Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). The legislature here put an exclamation point on it, as it were, by reiterating in (D) no other means were allowed.

Similarly, the legislature explicitly excluded the common law writ of replevin, which exists to allow one to demand the return of seized property prior to a final resolution of the merits of the underlying claim, Fuentes v. Shevin, 407 U.S. 67, 78-79 (1982). In short, the legislature made triply clear that it is denying courts any jurisdiction to order the return of

properly seized items considered to be counterfeit unless and until a Paragraph (C) or (H) action is filed.

Finally, 39-15-1195 explicitly references 44-53-530. To the extent the two may be considered as akin to a single statute for analytic purposes, the difference in wording becomes more important; the difference in language is presumed to indicate a difference in meaning. More particularly, the statue to which Farmer points is a statute dealing with forfeiture of other items [narcotics], which is incorporated by reference into 39-15-1195. Certainly the language the legislature specifically crafted for 39-15-1195 takes precedence, for purposes of 39-15-1195, over language in another statute incorporated by reference.

VI. ISSUE PRESERVATION AND THE LIKE

A. Farmer Does Not Contest the Point that the Panel Erred in Affirming Summary Judgment for Plaintiff on a Theory Opposite to Plaintiff's. Instead, He Offers Grounds on which He Believes the Supreme Court Could Affirm the Panel's Result Without Affirming Its Logic. He Errs.

The Sheriff argued that regardless of whether the substance of the panel's due process analysis was correct or not, erroneous or not, the panel erred in affirming summary judgment for the Plaintiff on a theory opposite to Plaintiff's. Farmer had based his case on a supposed inability to directly bring his claim to a court for a hearing on the merits; the panel held it makes no difference whether he had that option. A defendant is entitled to notice of the claim he will be required to defend against. To sua sponte rule in favor of the plaintiff under a theory directly opposite to the theory the plaintiff prosecuted offends due process, where, as here, the court in effect eliminated one of the prongs the plaintiff had claimed was essential to its case, and on which the defendant had focused his defense. Farmer does not even attempt to contest this point.

Instead, he once again suggests a means via which he believes this Court could affirm the panel's result, without endorsing the panel's logic. Farmer points out that (unlike the Court of

Appeals) he has been insistent all along that it matters very much whether he has a statutory option to be heard. He asks the Court to affirm on grounds that he had no option to be heard. His argument fails substantively, as he did have a statutory option to be heard.

B. Bowen Cannot Properly Be Extended As Far As Was Done In This Case.

Nor does Farmer directly address the Sheriff's claim that the Bowen doctrine is not good law, and that if it is good law, it cannot properly be extended as far as the panel extends it in the present case. He does not even attempt to justify Bowen's rationale.

Instead, Farmer proposes a novel rule that would extend to cross-appeals, generally. He argues that, where one party files a notice of appeal within ten days of the other party's receipt of written notice of the entry of the lower court's order, that other party gets a "pass" on issue preservation topics. Otherwise, he maintains, one party can "freeze" the order before its opponent has exhausted its chance to seek modification. This is because the filing of the notice of appeal transfers jurisdiction to the appellate court. It is an interesting argument; however, the Sheriff maintains the better procedure in such an instance is for the second party to file a motion with the appellate court seeking leave to file a motion with the lower court to modify the order.

With respect, Farmer's position only reinforces the gains to be had were the Court to take this opportunity to again clarify the rules regarding issue preservation. As the Court is undoubtedly aware, it has maintained a virtual drumbeat insisting that it is the duty of the appellant to provide a sufficient basis for review.[9] Nevertheless, while the general principles are clear, the Court may wish to consider whether it may be time to clarify, for the benefit of bench

[9] Respondent claims that Petitioner relies on I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.Ed.2d 716 (2000)) on the topic of issue preservation. Resp't Br., p. 27. Petitioner does cite I'On, L.L.C., but I'On, L.L.C. is far from the only case making a similar point. E.g., D & D Leasing Co. v. Gentry, 298 S.C. 342, 324, 380 S.E.2d 823, 824 (1989) (citing Germain v. Nichol, 278 S.C. 508, 299 S.E. (2d) 335 (1983)) (the appellant has the burden to furnish a sufficient record from which an intelligent review could be conducted) ("Petitioner did not meet this burden, and the Court of Appeals properly dismissed the appeal."); Wilson v. American Casualty Co., 252 S.C. 393, 166 S.E.2d 797 (1969) (similar). Farmer does not present any contrary cases, because he cannot.

and bar, the application of the issue preservation rules as to Bowen and as to appeals noticed within ten days of the lower court order.

VII. THE COURT'S JURISDICTION TO REVERSE THE COURT OF APPEALS

Farmer's final argument is that the Supreme Court lacks jurisdiction to reverse the Court of Appeals' refusal to affirm the grant of summary judgment in favor of the Sheriff on Farmer's cross-appeal. He cites S.C. Code § 14-3-330 to the effect that only final orders are appealable. His view would mean that the Supreme Court is virtually always precluded, on certiorari or on direct appeal, from ruling on both halves of an order on cross-motions for summary judgment, even where, as here, the issues on the cross-appeals are highly interrelated. His view would cause much unnecessary litigation, wasting the time of both the Supreme Court and the lower courts. See S.C. Code § 14-3-430 ("Upon an appeal under item (3) of § 14-3-330 the court may review any intermediate order involving the merits and necessarily affecting the order appealed from.")

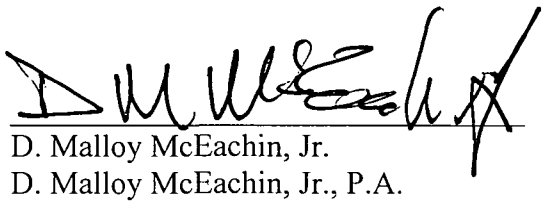
Conclusion

Respondent barely attempts to support the actual reasoning of the panel. The closest he comes is his suggestion that perhaps the panel had the state constitutional provision rather than federal provision in mind for its holding that due process is offended by "only" offering a claimant "the option" to be heard. The argument is erroneous.

Predominately, he argues other rationales that he hopes this Court will substitute for the panel's rationale. If any of these arguments were correct on the merits, and sufficient to carry the burden of resolving the case, the Court might properly affirm as modified, to remove the dangerous and erroneous precedents set by the panel. However, his arguments here are equally weak.

For the reasons set forth in the Sheriff's principal Brief in this matter, and for such other reasons as may be apparent to the Court, the Sheriff respectfully asks the Court to REVERSE the decision below.

Respectfully Submitted,



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

Attorney for Petitioner

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 certifies that this Petitioner's Reply Brief complies with Rule 211(b), SCACR.

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

Florence, SC
October 9, 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

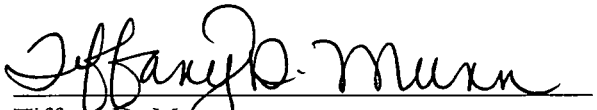
v.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Reply Brief 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



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

Florence, SC
October 9, 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

October 9, 2012

Ms. Linda Allen
Supreme Court of South Carolina
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 Ms. Allen:

Please find enclosed an original and seven (7) copies of the Motion to File Out of Time along with the original and sixteen (16) copies of the Reply Brief of the Petitioner regarding the above matter. Please find enclosed a check in the amount of $25.00 as the filing fee. I would ask that you return a stamped copy in the enclosed self-addressed envelope.

Petitioner further requests that the deadline for serving and filing the Reply Brief of the Petitioner be held in abeyance until the Court can consider this motion.

I have communicated with opposing counsel, and he has stated that he does not object.

By copy of this letter, I am serving all counsel in this matter.

Should you have any questions, please do not hesitate to contact me.

With kind regards, I am,

Yours very truly,

D. Malloy McEachin, Jr.

DMMJR/tdm
Enclosures

Cc: Mr. Patrick J. McLaughlin, Esquire