

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

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Case No. 2017-CP-26-07411

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Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,  
on Behalf of the 15th Circuit Drug Enforcement Unit,

Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars  
(\$20,771.00), U.S. Currency and Travis Green,

Respondent.

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INITIAL BRIEF OF APPELLANT

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S.C. SUPREME COURT

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## STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE ADMINISTRATIVE ORDER IS SUBJECT TO IMMEDIATE APPEAL?
2. WHETHER THE ADMINISTRATIVE ORDER WAS AN ABUSE OF DISCRETION?

### STATEMENT OF THE CASE

On November 10, 2017, Petitioner filed the underlying forfeiture action. On January 9, 2018, Respondent Travis Green (“Green”) filed his Answer.<sup>1</sup> (Answer). Petitioner and Green’s attorney conducted discovery and attempted in good faith to settle this case without success.

This case first appeared on the non-jury trial roster for the week of September 4, 2018. Green’s attorney filed a motion for continuance, which the circuit court granted and then continued this case to the next available term of court. (Continuance Motion & Form 4 Order Granting Continuance).

This case again appeared on the non-jury trial roster for the week of October 29, 2018. The circuit court again continued the case to the next available term of court due to limited court time, other jury trials taking precedence, and the time required to transport Green from prison. (Form 4 Order Granting 2nd Continuance).

On February 20, 2019, the Clerk of Court for Horry County emailed the parties notice of the instant case being on the non-jury trial roster for the week of March 18, 2018. (Email Horry County Clerk of Court, Travis Green (Feb. 20, 2019)).

The next day, February 21, 2019, the Honorable Steven H. John (“Judge John”) issued an Administrative Order which ordered “that all civil forfeitures within the Fifteenth Judicial Circuit should be immediately suspended until such time as the South Carolina State

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<sup>1</sup> While Green’s Answer contained a jury trial demand, the Clerk of Court inadvertently set this case on the non-jury trial roster. To date Green has not corrected this oversight.

Legislature takes action in regards to the holding of the United States Supreme Court in *Timbs v. Indiana*.” (Administrative Order). The Administrative Order was neither the result of a petition from any party nor connected to any forfeiture action. Upon information and belief, it is the only such order in South Carolina.

Shortly thereafter, the Clerk of Court amended the non-jury trial roster for the week of March 18, 2019 by adding next to this case the note “Action stayed per Judge John’s Administrative Order.” (Non-Jury Trial Roster).

At the roster hearing on March 18, 2019, the Honorable George M. McFaddin, Jr. (“Judge McFaddin”) stayed the instant case. Neither Petitioner nor Green’s attorney had moved for a continuance, and Judge McFaddin did not request input from the parties.<sup>2</sup> On March 19, 2019, Judge McFaddin issued a Form 4 Order staying the instant case “per Judge John’s Administrative Order dated February 21, 2019.” (Form 4 Order Staying Case).

While postured as an appeal from Judge McFaddin’s Form 4 Order, this appeal concerns Judge John’s Administrative Order. Judge McFaddin, at the time of the roster hearing, was a visiting judge assigned to the Horry County Court of Common Pleas trial docket. His Form 4 Order was a reiteration of Judge John’s Administrative Order, and any errors with the Administrative Order apply to Judge McFaddin’s Form 4 Order. In the interests of clarity, the focus of this appeal is the Administrative Order.

### **STATEMENT OF THE FACTS**

In October and September of 2017, Agent Freddie Curry with the 15th Circuit Drug Enforcement Unit (“DEU”) utilized a confidential informant (“CI”) to purchase several grams

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<sup>2</sup> The court reporter informed Appellant’s attorney that roster hearings are not recorded so a transcript could not be made.

of cocaine from Green on three separate occasions. (Petition). On November 2, 2017, DEU Agents arrested Green for distributing and trafficking cocaine and executed a search warrant at his home in Myrtle Beach. At his home, Agents discovered 132 grams of crack-cocaine, 32 grams of cocaine, 319 grams of marijuana, 27 Morphine tablets, and \$20,771.00 in U.S. Currency. The seized currency is the subject of this forfeiture action and to date is held in the DEU's forfeiture bank account.

On October 16, 2018, Green pled guilty to two charges arising out of the November 2, 2017 arrest: distribution of cocaine, 2nd offense,<sup>3</sup> and possession with intent to distribute marijuana, 1st offense. (Sentencing Sheet). Judge John sentenced Green to 15 years incarceration for the cocaine offense and 5 years incarceration for the marijuana offense – both sentences to run concurrently.

## **ARGUMENT**

### **I. The Administrative Order Is Subject to Immediate Appeal.**

#### **A. Standard of Review**

The determination of whether a party may immediately appeal an order issued before or during trial is governed by S.C. Code Ann. § 14-3-330. *See Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 671 S.E.2d 98 (2008).

S.C. Code Ann. § 14-3-330 states in whole:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review

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<sup>3</sup> On July 16, 2014, Green was first convicted of distribution of crack-cocaine.

any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

“By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.” *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015).

## **B. Discussion**

### ***i. The Administrative Order Discontinued this Case.***

The Administrative Order<sup>4</sup> is subject to immediate appeal because it satisfies section (2) “[a]n order which affects a substantial right [and]...discontinues an action.” *Id.*

The Administrative Order stays this case for an event that may never occur, and therefore, it is a discontinuation of this case. Under the Administrative Order, this case is stayed until “such time as the South Carolina State Legislature takes action in regards to the holding of the United States Supreme Court in *Timbs v. Indiana*.” (Administrative Order).

The legislature could change the state’s forfeiture laws tomorrow, next year, in five years, or never. Moreover, any changes to the forfeiture law may or may not take into account *Timbs v. Indiana*, 139 S.Ct. 682 (2019). Presumably, Judge John will determine when, if ever, these

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<sup>4</sup> References to the Administrative Order also include Judge McFaddin’s Form 4 Order.

conditions have been met and allow this case, along with all other pending forfeiture cases in the 15th Judicial Circuit, to go forward. However, these events may never occur.

In *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006), this Court held an order temporarily staying a case pending a ruling by the Federal Communications Commission (“FCC”) was not immediately appealable. In other words, *Edwards* did not satisfy section (2), “discontinues the action,” because the stay had a certain lifting event – a ruling by the FCC. It may take a month or a year, but at some point the FCC would rule. *Edwards* addressed this issue by stating, “Edwards is free to move the circuit court for a lift of the stay, or such other relief as may be necessary, if the matter pending before the FCC is unduly delayed.” *Id.* at n. 4.

However, the relief of a circuit court judge lifting the Administrative Order is unavailable to Appellant. A motion to lift the Administrative Order would be asking Judge McFaddin to overrule Judge John’s Administrative Order. There is a general rule prohibiting one circuit judge from overruling another. *See Narruhn v. Alea London Ltd.*, 404 S.C. 337, 341, 745 S.E.2d 90, 92 (2013); *see also Binkley v. Burry*, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct. App. 2002) (“Generally, one circuit court judge may not reverse or modify the order of another circuit court judge.”); and *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008) (“[O]ne circuit court judge may not overrule another.”).

Alternatively, Appellant could request Judge John lift the Administrative Order, but Judge John is the Chief Administrative Judge for General Sessions Court, and this case is in Common Pleas Court. It is unclear how Judge John could hear such a case without some special motion hearing, which would conflict with the unified court system. *See argument section infra.*

For the reasons stated above, the South Carolina Legislature may never change the forfeiture statute or specifically address *Timbs*, and therefore, the Administrative Order, as a stay requiring these conditions, is immediately appealable as a discontinuation of this case.

## **II. The Administrative Order Was an Abuse of Discretion.**

### **A. Standard of Review**

The circuit court has discretion whether to grant a stay of a matter pending before the court. *Civil Action No.: #2001-CP-32-0711 Carolina Water Service v. Lexington County Joint Municipal Water and Sewer Commission*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-231 (Ct. App. 2006), *rev'd on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007). Accordingly, the appropriate standard of review is abuse of discretion. *Id.* “An abuse of discretion arises where the [circuit] court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.” *Id.* (internal citations omitted).

### **B. Discussion**

#### ***i. The Administrative Order Was a Violation of the Unified Court System.***

The purpose of the unified court system, as expressed in the South Carolina Constitution, Article V, Section 1, is “to insure that each participant in the judicial system, be he litigant, lawyer or judge, can find in the Constitution, statutes and rules of [the Supreme Court] a court system which is the same in each county of the state.” *Spartanburg County Dept. of Social Services v. Padgett*, 296 S.C. 79, 85, 370 S.E.2d 872, 876 (1988).

The Administrative Order is a violation of the unified court system in that it: (1) is a local, non-uniform rule; (2) usurped the authority of the Chief Administrative Judge for the Court of Common Pleas; and (3) abdicated judicial review.

**a. The Administrative Order Was a Local, Non-Uniform Rule.**

By reason of the mandate of Article V of the South Carolina Constitution, a court may not adopt its own rules of administration or practice and procedure. “Such local, non-uniform rules are inconsistent with both the provisions and purpose of the constitutional mandate and are therefore unconstitutional and void.” *Id.* at 85, 875. “[T]here is no place in the unified judicial system for local rules which have the effect of varying the administrative and procedural rules of practice from circuit to circuit and court to court.” *Id.* at 85, 876; *State v. Duncan*, 274 S.C. 379, 382, 264 S.E.2d 421, 423 (1980) (“We hold that under these constitutional mandates a circuit court may not promulgate its own “...rules governing...practice and procedure...””) (internal citations omitted).

As stated above, the Administrative Order caused the indefinite stay of this case. However, the Administrative Order impacted several other forfeiture cases and created a system whereby Appellant must ask Judge John for special permission before any action can be taken regarding a forfeiture case.

The following is a timeline of the Administrative Order’s impact:

February 26, 2019: In *Richardson v. Gamble and Johnson*, 2018-CP-22-700, the Georgetown Clerk of Court denied a proposed consent order correcting a clerical error due to the Administrative Order. (Email Georgetown Clerk of Court, Rejection Notice (Feb. 26, 2019)).

February 28, 2019: In *Richardson v. Jordan and Jordan*, 2018-CP-26-2238, the Horry County Clerk of Court denied Appellant’s counsel’s request for a hearing on a motion to amend his petition and informed him that if the motion was for the case to go forward, it could not be heard due to the Administrative Order. (Email Horry County Clerk of Court, Forfeiture case motion to amend (Feb. 28, 2019)).

March 18, 2019: In the same case, *Richardson v. Jordan and Jordan*, Appellant’s counsel sent an email to Judge John’s law clerk asking for special permission to add a third-party claimant so a settlement could go forward. Judge John approved the motion and signed an order allowing the addition of a third-party claimant

only for the purposes of settlement. (Email Judge John Law Clerk, Richardson v. Jordan (March 18, 2019)).

March 19, 2019: Judge McFaddin stayed this case and Richardson v. Billy Freshley, 2018-CP-26-649, due to the Administrative Order. (Richardson v. Freshley Form 4 Order).

March 25, 2019: After the Horry County Clerk of Court rejected the settlement agreement in Richardson v. Pickett, 2018-CP-26-6446, due to the Administrative Order, Appellant's counsel emailed Judge John's law clerk again for special permission to approve the settlement. Initially, Judge John agreed to sign the settlement agreement. (Email Judge John Law Clerk, Retraction (March 25, 2019)).

However, in a subsequent filing Judge John denied the settlement "until the state Supreme Court takes action in regards to our Civil Forfeiture Statute and the US Supreme Court ruling in Timbs v. Indiana." (E-Filing Court Review).

April 3, 2019: The Horry County Clerk of Court rejected the filing of four forfeiture petitions due to the Administrative Order. (Four Emails Rejecting Filing).

These are just the cases that have had an adjudication. At present there are 72 pending forfeiture cases in the 15th Judicial Circuit. All of these cases involve property in the possession of a law enforcement agency, and the Administrative Order has cut off all means of determining the lawful owner of this property – be it the state or private party.

On information and belief, the Administrative Order is the only one of its kind in South Carolina. Its effect has been the creation of special rules and procedures particular only to the 15th Judicial Circuit. Therefore, by creating its own local rule, the Administrative Order is a violation of the unified court system.

**b. The Administrative Order Usurped the Authority of the Chief Administrative Judge for Common Pleas Court.**

At the time of his Administrative Order, Judge John was the Chief Administrative Judge for the Court of General Sessions in the 15th Judicial Circuit. (Administrative Order). The Honorable Larry B. Hyman, Jr. was the Chief Administrative Judge for the Court of Common

Pleas in the 15th Judicial Circuit. Forfeiture actions, pursuant to S.C. Code Ann. § 44-53-530(a), must be filed in the Court of Common Pleas.

Judge John's responsibilities were to maintain the General Sessions trial docket as described in Supreme Court Administrative Order, 2011-02-04-01 (February 4, 2011). By issuing an Administrative Order which indefinitely stayed forfeiture cases in Common Pleas Court, Judge John usurped the authority of the Chief Administrative Judge for Common Pleas Court. *See* Supreme Court Admin. Order, 2011-02-04-01 (Feb. 4, 2011) ¶ 2 (“[T]he authority of circuit judges designated as chief judges for administrative purposes shall include...[t]o set jury and nonjury trial rosters and/or dockets for all civil terms of circuit court and to designate which presiding judge shall hear each roster or rosters.”).

Judge Hyman, as the Chief Administrative Judge for Common Pleas Court, set the March 18, 2019 non-jury trial docket and assigned Judge McFaddin to preside over this docket. In short, the trial docket was an order from Judge Hyman that these cases should be heard. *Id.*; *State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (“Setting the trial docket therefore is the prerogative of the court.”); *Newman v. Old West, Inc.*, 286 S.C. 394, 397, 334 S.E.2d 275, 276 (1985) (“Since the adoption of the new Judicial Article V to the South Carolina Constitution in 1973, a new system of operation has come into being such that in the interest of judicial economy and disposition of cases for all litigants, the administrative judge must have control of the trial docket.”).

The Administrative Order, which came from General Sessions Court, usurped control of portions of the Common Pleas Court trial docket. This usurpation of authority violated the unified court system.

**c. The Administrative Order Is an Abdication of Judicial Review.**

The Administrative Order based its stay of forfeiture cases on *Timbs v. Indiana*, 139 S.Ct. 682 (2019). However, by blocking the adjudication of any forfeiture cases, the Administrative Order blocked judicial review of *Timbs* to the facts of this case and/or South Carolina's forfeiture statute.

*Timbs* held the 8th Amendment's Excessive Fines Clause applies to the States. *Id.* at 687 ("The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment."). While it is an important decision, it did not order South Carolina or any other state to stay their forfeiture cases. Justice Ginsberg, writing for the majority in *Timbs*, specifically excluded the issue of "[w]hether the Eighth Amendment's Excessive Fines Clause restricts States' use of civil asset forfeitures." *Id.* at 690.

To the extent *Timbs* affects this case, another case, or the South Carolina forfeiture statute as a whole, those issues are better addressed through a trial and subsequent judicial order. In other words, judicial review is the preferred avenue for clarifying recent interpretations of the law. *See Marbury v. Madison*, 5 U.S. 137 (1803) *and its progeny*.

This Court, the U.S. Fourth Circuit Court of Appeals, the U.S. Supreme Court, and any other court with jurisdictional authority routinely issue orders which instruct law enforcement on search and seizure, use of force, and general police powers. *Timbs* is only the most recent such judicial order, and it does not contain any extraordinary mandate requiring the deadlock of this case and all other forfeiture cases. If anything, the Administrative Order exacerbates the concerns in *Timbs* by indefinitely keeping property in the possession of law enforcement and precluding the parties' access to a fair trial.

At a more fundamental level, hearing cases is the primary duty of the circuit court. *See* Rule 501 Preamble, SCACR (“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us...The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.”).

By abdicating judicial review, the Administrative Order further violated the unified court system.

***ii. The Administrative Order Was a Violation of Separation of Powers.***

Appellant, as the Solicitor for the 15th Judicial Circuit, is an “officer of the executive department.” *State v. Singleton*, 100 S.C. 465, 84 S.E. 989, 990 (1915). He has the right to carry out the duties of his office without interference from the other branches of government. *See* S.C. Const. art. 1, § 8. Separation of powers (“In the government of the State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”); *S.C. Public Interest Foundation v. S.C. Trans. Infrastructure Bank*, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) (“Under a separation of powers, the legislative department makes the laws, the executive department carries the laws into effect, and the judicial department interprets and declares the laws.”).

A solicitor’s duties are derived from state statutes and the common law. *See* S.C. Const. art V, § 24 (“[t]he General Assembly shall provide by law for their duties.”). In this instance, S.C. Code Ann. § 44-53-530(a) mandated forfeiture of property “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.”

Once the case is brought to trial, “[t]he judge shall determine whether the property is subject to forfeiture and order the forfeiture confirmed.” S.C. Code Ann. § 44-53-530(a).

Judge John’s Administrative Order deadlocked the forfeiture process and obstructed Appellant from carrying out his statutory duty.

***iii. The Administrative Order Appropriated Appellant’s Prosecutorial Discretion.***

“The South Carolina Constitution and South Carolina case law place the unfettered discretion to prosecute solely in the prosecutor’s hands...Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they may simply decide not to prosecute the offense in its entirety.” *State v. Needs*, 333 S.C. 134, 146, 508 S.E.2d 857 (1998) (internal citations omitted).

“The Judicial Branch is not empowered to infringe on the exercise of this prosecutorial discretion; however, on occasion, it is necessary to review and interpret the results of the prosecutor’s actions.” *Id.*

In this instance, the Administrative Order does not review or interpret the facts or the law of this case or any other forfeiture case brought by Appellant. Instead, the Administrative Order is a blanket pre-trial stay over all forfeiture actions without explanation or analysis. Therefore, it is an appropriation of Appellant’s prosecutorial discretion.

Finally, “the office of the solicitor is a quasi judicial one and his duty is to seek justice and not just convictions in every case.” *State v. Addis*, 257 S.C. 482, 487, 186 S.E.2d 415, 417 (1972).

Access to the court system is a fundamental and deeply rooted right in the American judicial system. *See* U.S. Const. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”); S.C. Const. art. I, § 3 (“The privileges and

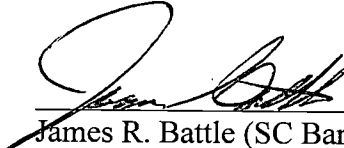
immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”).

In this case, the Administrative Order is a clear violation of Green’s procedural due process rights. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest.”); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (“The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment...”); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (The opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.”).

As the 15th Circuit Solicitor, Appellant represented to Green and other claimants that their seized property would be handled fairly and in accordance with the law. The Administrative Order obstructed those representations by denying claimants access to the court.

### CONCLUSION

For the reasons set forth above, this Court should reverse Judge McFaddin’s Form 4 order and set this case for trial.

  
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