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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2017-CP-26-07411

(Appellate Case No. 2020-000092)

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.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

I. The Allocation of Forfeiture Money to Law Enforcement Does Not Shock the Conscience.

Respondent argues forfeiture money going to law enforcement distorts their judgment and results in "zealous enforcement." (Respondent's Brief, p. 4) (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980)). This is a substantive due process argument.

Substantive due process violations require conduct that "shocks the conscience." *U.S. v. Salerno*, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience.'") (internal citations omitted). The U.S. Supreme Court has interpreted conduct that shocks the conscience to be conduct that "violates the 'decencies of civilized conduct'" and conduct "so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency." *County of Sacramento v. Lewis*, 523 U.S. 833, 846-847 (1998) (internal quotations omitted).

In the instant case, the record does not contain any facts which support a finding of zealous enforcement that shocks the conscience. In lieu of facts, Respondent cited news articles. These articles are hearsay and inadmissible. Yet Respondent described these articles as "facts [that] show the pernicious, real-world, effect of the financial incentive contained in [S.C.'s Forfeiture Statutes]." (Respondent's Brief, p. 10).

Based on Respondent's reasoning, tickets, citations, and fines could also be unconstitutional – not to mention bonds, court costs, and pre-trial intervention programs – because these law enforcement actions also involve "institutional" gain. The rural police officer waiting for the speeding motorist could arguably be motivated by institutional gain.

Notwithstanding Respondent's arguments, "[p]rosecutors need not be entirely 'neutral and detached'…In an adversary system, they are necessarily permitted to be zealous in their

enforcement of the law." *Marshall*, 446 U.S. at 248 (internal quotation omitted). Therefore, a state statute which directs forfeiture money to law enforcement does not shock the conscience.

II. Respondent's Case Law on Law Enforcement Bias Does Not Support a Facial Invalidation of S.C.'s Forfeiture Statutes.

Tumey and *Ward* held the *judge* cannot financially benefit from criminal convictions. *See Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (Holding that when the judge "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant]," there is a due process violation.); and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 58 (1972) (Trial before a judge with "responsibilities for revenue production" was a due process violation.). The role of judges is not at issue in the instant case.

In *Marshall* and *Flora* the courts refused to facially invalidate the statutes in question. *See Marshall*, 446 U.S. 238 (1980) (holding Fair Labor Standards Act did not violate due process); and *Flora v. Southwest Iowa Narcotics Enforcement Task Force*, 292 F.Supp.3d 875 (S.D. Iowa 2018) (holding Iowa civil forfeiture statute was not facially invalid).

Harjo, the case most frequently cited by Respondent, was actually two orders. In the first order, the court, ruling on Albuquerque's motion to dismiss, found Albuquerque's forfeiture ordinance constitutional. *See Harjo v. City of Albuquerque*, 307 F.Supp.3d 1163, 1205 D.N.M. 2018) ("That the City of Albuquerque's vehicle forfeiture program budgets for and uses funds it raises from forfeitures to pay for its costs does not violate due process."). In the second *Harjo* order, the court, ruling on Harjo's motions for summary judgment and reconsideration, found "the forfeiture program described in the pleadings and on the Forfeiture Ordinance's face is constitutional, but the forfeiture program that this case's discovery reveals is not." *See Harjo v. City of Albuquerque*, 326 F.Supp.3d 1145, 1196).

Respondent's cited cases did not do what Respondent asks this Court to do – facially invalidate a state statute. Without authority, Respondent's arguments fail to meet the high burden of facially invalidating a statute.

III. *Nelson* Does Not Apply to Forfeitures and Therefore, Did Not Invalidate S.C.'s Forfeiture Statutes.

Nelson v. Colorado, 137 S.Ct. 1249 (2017) is not "binding U.S. Supreme Court precedent." (Respondent's Brief, p. 2). The challenged statute in *Nelson* was not a forfeiture statute, and it never mentioned forfeitures. Instead, *Nelson* narrowly applied to money exacted from a defendant whose convictions have been invalidated.

Other courts have found *Nelson* inapplicable to forfeitures. *See State v. Burton*, 2018-Ohio-95, ¶ 22 (2018) (holding *Nelson* did not apply to defendant's forfeiture and upholding the due process provided by Ohio's *in rem* forfeiture statute); and *Commonwealth v. Martinez*, 480 Mass. 777, 109 N.E.3d 459 (2018) (holding *Nelson* did not apply to forfeitures because *Nelson* concerned criminal matters and forfeitures are civil proceedings).

If *Nelson* was "on-point U.S. Supreme Court precedent" (Respondent's Brief, p. 16) which invalidated the burden shifting scheme found in S.C.'s Forfeiture Statutes, then hundreds of federal, state, and municipal laws would have also been invalidated. Such is not the case, and therefore, *Nelson* does not apply to the instant case.

CONCLUSION

"A facial challenge to a statute is 'the most difficult…to mount successfully,' as it requires the challenger show the legislation at issue is unconstitutional in all its applications." *State v. Legg*, 416 S.C. 9, 13-14, 785 S.E.2d 369, 371 (2016) (internal citations omitted). To bring about *any* forfeiture under S.C.'s Forfeiture Statutes, the prosecutor must get a judge's signature. So long as the judge remains an impartial gatekeeper, S.C. Forfeiture Statutes are

facially constitutional. Therefore, this Court should reverse the trial court's Order and remand this case for trial.

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July 24, 2020

Certificate of Counsel

The undersigned hereby certifies that the Final Rely Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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