STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Appellate Case No. 2020-000092

Case No. 2017-CP-26-07411

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.

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL ON BEHALF OF APPELLANT

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The Attorney General concurs in Appellant's statement of the Issues on Appeal.

STATEMENT OF THE CASE

The Attorney General concurs in Appellant's Statement of the Case.

STANDARD OF REVIEW

The Attorney General concurs in Appellant's Standard of Review.

ARGUMENT

The trial court erred by ruling that South Carolina's civil forfeiture statutes, S.C. Code Ann §§ 44-53-520 and 44-53-530, are unconstitutional in their entirety. The Attorney General asks the Court to find for Appellant and reverse this ruling for a number of reasons. First, the General Assembly chose to implement South Carolina's civil asset forfeiture scheme to achieve the vital government interest of combating criminality—specifically drug trafficking—and the trial court failed to adequately consider this in its analysis. Second, basic principles of the separation of powers require the question of how best to pursue this interest be answered by the legislature not the judiciary—a fact which the trial court ignored. Third, even if the judiciary is to consider the constitutionality of these statutes, they necessitate a case by case analysis, which the trial court failed to undertake. Finally, facial challenges to the constitutionality of laws require meeting an immense burden. Despite the sweeping nature of its order, the trial court failed to establish that South Carolina civil asset forfeiture statutes are unconstitutional. As a result, the Attorney General urges the Court to correct this error and hold in favor of Appellant on all issues before it.

I. Civil asset forfeiture serves a vital governmental interest, and the question of how best to pursue that interest is reserved for the legislature not the judiciary.

Whether South Carolina's civil asset forfeiture statutes represent sound policy decisions is a question properly answered by the legislature not the judiciary. However, even if the Court decides to consider the policy matters involved in South Carolina's civil asset forfeiture statutes, the decisions of the legislature expressed in them constitute sound policy decisions. The policy considerations involved are best illuminated by reviewing the historical context of civil asset forfeiture and the implications of criminalizing forfeiture.

A. The History of Civil Asset Forfeiture Statutes Demonstrates Their Effectiveness and Supports Their Adoption.

South Carolina's civil asset forfeiture statutes follow in the footsteps of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"), so we begin by considering RICO and its historical context. RICO demonstrates the extraordinary import of civil asset forfeiture and the role it plays in comprehensive law enforcement. From the 1920's until RICO's enactment in 1970, the mafia was powerful. Law enforcement struggled to gain traction against it because while law enforcement could arrest foot soldiers, mob bosses avoided direct involvement and often thereby evaded prosecution. Congress determined that the best way to dismantle a criminal organization was to take down the leadership and seize the proceeds. RICO criminalized discrete criminal acts along with the existence of the criminal organization, and allowed prosecutors to link acts over a period of time. It also included an aggressive civil asset forfeiture scheme. The civil forfeiture provisions were wildly successful, and as a result, the mafia ceased to be a dominant criminal force in the 1980's. A wide array of experts support RICO's effectiveness for this purpose. *See* G. Robert Blakey, *Materials on RICO: Criminal Overview* and Brian Gettings, *Materials on RICO: Civil Overview*, TECHNIQUE IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME (Cornell Institute on Organized Crime 1979), at https://www.ncjrs.gov/pdffiles1/Digitization/78839-78854NCJRS.pdf

RICO and civil asset forfeiture were so successful on the federal level that most states enacted "little RICOs" and civil asset forfeiture statutes of their own. David R. Fine, Bennis v. Michigan *and Innocent Owners in Civil Forfeiture: Balancing Legitimate Goals with Due Process and Reasonable Expectations*, 5 Geo. Mason L. Rev. 595, 605 n.91 (1997). South Carolina was among them. A two pronged approach is necessary because some criminals will serve time in jail in return for enough money, making jail alone an inadequate deterrent. Also, if the law only

provides for the ability to jail individual criminals, others will step in and continue to run the criminal business. The ability to go after criminal enterprises as a whole, and specifically their assets, is crucial to combatting and dismantling these organizations. As a part of this scheme, it is vital that law enforcement has the ability not just to go after fines and penalties but to forestall the very goal of criminal organizations, namely profit, through civil asset forfeiture. Gerald Lynch explains:

> [A]s with other forms of criminal activity, the financial penalties attached to narcotics violations have not necessarily been commensurate with the extraordinary profit potential of such violations. The fines provided by federal narcotics laws . . . until recently have not been remotely comparable to the profits of major drug dealers. Even if the fines had been significantly higher, however, they would not be adequate to take the profit out of drug dealing.

Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 925 (1987).

RICO was the grandfather of the state civil asset forfeiture provisions, and the same concerns that led to the enactment of RICO at the federal level impelled the South Carolina General Assembly to create its civil asset forfeiture statutes. These statutes were enacted to give law enforcement the tools to adequately combat vast criminal organizations.

Additionally, the goal of combatting criminality by limiting its profitability is best served through civil asset forfeiture, as instituted by the South Carolina General Assembly, and not criminal asset forfeiture, as urged by Respondents. Resp. Brief at 16. First, it is noteworthy that South Carolina is far from alone in using civil asset forfeiture as a means for counteracting criminality, especially drug trafficking. The vast majority of states have civil asset forfeiture; only six have criminal asset forfeiture. App. Brief at 6. This is because civil asset forfeiture allows law enforcement to sue the *res*, the property or money, rather than having to obtain personal jurisdiction over the person and obtain service on the person. The historical development is

instructive on why this is beneficial. Civil asset forfeiture came from the enforcement of navigation acts in English law.

> And they had a very practical problem; the person who owned the boat was often in Rotterdam, but the boat with the contents without paid duties would be in England. If you then had the traditional English procedure, beginning with the service of process on the defendant, and then an adversary hearing between the persons, how would you get service on some boat owner in Rotterdam? So, they decided to abandon the typical procedure in the admiralty context. The reason in admiralty that you sue the boat *in rem* is because the owner is somewhere else. This is pragmatic. It has nothing to do with theory. We carried civil forfeiture into the admiralty courts in this country as an *in rem* procedure against boats and goods, principally to enforce the tax laws.

G. Robert Blakey, *Shaping Today's Forfeiture Law: A Conversation with Senator McClellan*, 21 J. LEGIS. 175, 177 (1995). While South Carolina did not pass its civil asset forfeiture statutes for fear that property involved in modern day criminal enterprises might sail back to Rotterdam, the premise remains. Seizure and confiscation of property is necessary in order to prevent individuals from simply removing the property from the state, whether that be to North Carolina or Georgia by land or to an almost unlimited number of locations via air or sea travel, in order to retain possession. In *Calero-Toledo*, the Supreme Court of the United States recognized forfeiture

> thereby foster[s] the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974). Cash is even more readily relocated and is more fungible than a boat. Thus,

> [t]he enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.

Id. at 683 (1974). Confining forfeiture to criminal convictions and tying it to *in personam* jurisdiction would drastically undercut the ability of law enforcement to combat criminality and would represent a dramatic departure from existing United States Supreme Court precedent.

Finally on this point, the concerns raised by the trial court, Respondents, and their amici are already addressed in the law. Specifically, they object to a lack of judicial oversight, a lack of due process, and impermissible incentive structures.[1] The trial court held that there was no judicial review or authorization, but this is simply not true. South Carolina law provides that "[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). Even when everyone involved consents to a forfeiture, the forfeiture must still be approved and confirmed by a judge. *See* S.C. Code Ann. § 44-53-530(d) ("Any forfeiture may be effected by consent order approved by the court . . . ."). This also applies when a defendant has agreed to forfeit property as part of a plea agreement. *See Op. S.C. Att'y Gen*., 2008 WL 4489045 (Sept. 19, 2008).

[1] The Buckeye Institute and Americans for Prosperity Foundation have moved to file an amicus brief discussing the impact of civil asset forfeiture statutes on impoverished and low-income individuals and to urge the adoption of an economic means prong when evaluating forfeitures. There is nothing in the record to support their assertions, and the Attorney General is not aware of any discussions regarding this possibility prior to their filing. As such, the Attorney General submits that these considerations are not properly before the court. *See* SCACR 208(b)(1)(B). However, even if the Court does consider these arguments, the Attorney General moves the Court to reject them and not to adopt economic means as a consideration in forfeiture cases. These organizations point to the Indiana Supreme Court's decision to impose the burden on the owner of the property to show "gross disproportionality" and to consider the owner's economic means as factor in that analysis. However, this Court is not compelled to follow Indiana's lead because, as the Indiana Supreme Court noted, the Indiana court was breaking new ground and that the United States Supreme Court had not spoken on the matter. *State v. Timbs*, 134 N.E.3d 12, 36 (Ind. 2019). Should this Court adopt economic means as a factor, the court will incentivize drug dealers to prey upon impoverished individuals and recruit them because money and other instrumentalities in their possession may not be subject to forfeiture.

Concerns have also been raised regarding due process requirements. There are express limits on what property is subject to forfeiture. *See* S.C. Code Ann. § 44-53-520(a). The burden is initially on law enforcement to establish probable cause of a connection between property seized and illegality as described in the statute. *See Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 130-31, 470 S.E.2d 373, 376 (1996). Once this burden is met, the burden shifts to an interested party to demonstrate they are an innocent owner. *Id*. Shifting the burden of proof in an *in rem* proceeding is not a violation of the Due Process clauses of the federal and state constitutions, and this process has routinely been held to conform with the requirements of due process. *Pooler v. Wilson*, 452 F. Supp. 3d 428 (D.S.C. Apr. 3, 2020) (citing *Van Oster v. State of Kansas*, 272 U.S. 465, 468 (1926)); *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495 (2011) (citing *Medlock*, 322 S.C. at 131, 470 S.C. at 376).

The trial court also ruled that the distribution of funds to law enforcement agencies creates an unconstitutional and perverse incentive. There is no mention in the record of how seized drug forfeiture money is used by law enforcement, but there are limits in the law.

> For law enforcement agencies, the accounts must be used for drug enforcement activities, or for drug or other law enforcement training or education.
> …
> These accounts must not be used to supplant operating funds in the current or future budgets. Expenditures from these accounts for an item that would be a recurring expense must be approved by the governing body before purchase….
> …
> All expenditures from these accounts must be documented, and the documentation made available for audit purposes and upon request by a person under the provisions of Chapter 4, Title 30, the Freedom of Information Act.

S.C. Code Ann. § 44-53-530(g). The legislature decided forfeiture money must be used for drug enforcement. The mere transfer of funds to law enforcement is not enough to make the civil asset forfeiture statutes unconstitutional. *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1197 (D.N.M. 2018) ("The Court agrees that there is not necessarily a constitutional violation if"

forfeited funds are used by law enforcement.). The use of forfeited funds and property by law enforcement is strictly circumscribed, precisely to prevent the perverse incentives Respondents decry. *See* S.C. Code Ann. § 44-53-530(g) (requiring funds to be used for drug enforcement activities or law enforcement training).

B. Modifications of South Carolina's Civil Asset Forfeiture Statutes Are the Purview of the Legislature, not the Judiciary.

Moving beyond whether South Carolina's civil asset forfeiture statutes constitute sound policy making, as was adequately described by Appellant, South Carolina's civil asset forfeiture statutes are well within constitutional bounds. As a result, any modification to them ought to be carried out by the legislature not the courts. South Carolina's Constitution requires a strict separation of powers amongst its government. *See* S.C. Const. Art. I, § 8 ("In the government of this 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."). Creating and amending laws is firmly within the purview of the legislature, not the judiciary. *South Carolina Public Interest Foundation v. South Carolina Transp. Infrastructure Bank*, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) (citing *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1979)). ("The legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws."). Moreover, when considering the appropriateness of judicial review and modification of civil asset forfeiture statutes, the Supreme Court of the United States held in *U.S. v. Bajakajian* that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." 524 U.S. 321, 336 (1998) (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983) and *Gore v. United States*, 357 U.S. 386, 393 (1958)). That is to say, decisions regarding which policy arguments are persuasive ought

to be determined by the legislature not the judiciary. Thus, the question of whether South Carolina's civil asset forfeiture statutes constitute the best possible method for achieving their desired goal is a question left to the legislature. The trial court erred by assuming the role of a legislature and substituting its own policy making preferences for those of the South Carolina General Assembly.

The South Carolina General Assembly's decision to institute a civil asset forfeiture scheme represents sound reasoning. Reasoning which should compel the Court to leave the scheme unaltered. Moreover, respecting the separation of powers and allowing the General Assembly to amend the scheme as it deems appropriate requires the court to leave questions of modification to the legislature.

II. The trial court failed to apply the case-by-case analysis required to test the constitutionality of the forfeiture at issue and failed to establish that South Carolina's civil asset forfeiture statutes are facially invalid.

The trial court's determination that South Carolina's forfeiture statutes violate both state and federal constitutions ignores facts that would justify the underlying forfeiture under any case-by-case measure of the constitutionality of the forfeiture sought. Additionally, the trial court's order utterly fails to establish that South Carolina's statutes are facially invalid.

A. The Trial Court Failed to Consider the Facts on This Case in Its Decision.

The nature of civil asset forfeitures, and the logic used by the trial court, requires any challenge to the law brought under the prohibitions on excessive fines to be against the law as applied and not facially. Both the United States and South Carolina Constitutions provide that excessive bail shall not be required, "nor shall excessive fines be imposed." The only difference between the two Excessive Fines Clauses is the presence of "shall" and "be" in the state constitution. Because the Excessive Fines Clauses protect against an *imposition* of an excessive

fine, the inquiry of whether an excessive fine has been imposed cannot occur until a specific "fine" has been imposed. *United States v. Lippert*, 148 F.3d 974, 977 n.2 (8th Cir. 1998). As described by Appellant, case law already exists which holds that the possibility of an excessive fine does not invalidate a statute facially. App. Brief at 10 (citing *Singletary v. Wilson*, 191 S.C. 153, 3 S.E.2d 802 (1939)). As such, the civil asset forfeiture statutes must be subjected to an as-applied challenge not a facial challenge.

To violate the federal Excessive Fines Clause, a forfeiture must be grossly disproportional to the gravity of a defendant's offense, so there must be an analysis which incorporates and compares both (1) a forfeiture and (2) a fact-specific offense. *See Bajakajian*, 524 U.S. at 334. The *Bajakajian* test thus requires the Court to consider a specific forfeiture in its analysis. The test regarding whether a forfeiture violates the South Carolina Excessive Fines Clause is even more fact intensive. *See Medlock*, at 132-33, 470 S.E.2d at 377 (requiring courts to examine the nexus between the offense and the property at issue, the culpability of the owner, and the severability of the offending property). In either analysis, it is the judiciary's burden to decide each particular forfeiture case on its particular facts. *See Singletary*, at 153, 3 S.E.2d at 804 (1939) (explaining that because "the gravity of the offense is often materially affected by the amount involved and the aggravation of the circumstances, and the measure of the punishment therefor is necessarily influenced by numerous factors[,] . . . [i]t necessarily follows that" fines imposed without a statutory maximum limit are subject to review by appellate courts under the Excessive Fines Clause of the State constitution).

The trial court failed to undertake either analysis. R. at 6-7. The trial court's order is devoid of any reference to the facts of the case before it. Likewise, Respondent does not address the facts of the case, and in fact, only mentions Mr. Green a handful of times. And yet the facts of this case

clearly support forfeiture. After three controlled purchases of cocaine from Mr. Green, law enforcement seized 132 grams of crack, 32 grams of cocaine, 319 grams of marijuana, and 27 morphine tablets from his home, where the money at issue in this case was also found. Mr. Green was charged with trafficking crack and cocaine, second offense, and possession with intent to distribute marijuana and a controlled substance, second offense. Mr. Green pled guilty to distribution of cocaine, second offense, and possession with intent to distribute marijuana, first offense, and the plea court imposed the maximum sentences of incarceration for each charge and no fines.[2] The forfeiture of $20,771 in cash seized from Mr. Green's property is less than half of the $55,000 the plea court could have imposed in fines and thus is not disproportionate under *Bajakajian* or *Medlock*. The proximity of the funds to the narcotics seized establishes probable cause to believe they are the result of his drug business.

The facts of this case make clear, Mr. Green was not a marijuana user caught with a single joint, whose house the police then raided. He repeatedly sold a confidential informant narcotics and had significant amounts of narcotics in his home. Mr. Green has failed to present any evidence that the funds seized are not drug money. Under existing case law, there is not a possible analysis whereby the facts of this case could support a finding that the forfeiture which occurred constituted an excessive fine in violation of either the South Carolina or United States Constitution.

B. The Trial Court's Analysis Does Not Support Its Holding that South Carolina's Civil Asset Forfeiture Statutes Are Facially Invalid.

The trial court went beyond rejecting the specific forfeiture at issue in this case and ruled that South Carolina's civil asset forfeiture statutes are unconstitutional on their face. "A facial challenge is an attack on a statute itself as opposed to a particular application." *Doe v. State*, 421

[2] The Record is silent as to whether the plea court imposed any fines. The public index reflects only the imposition of flat, remedial surcharges.

S.C. 490, 502, 808 S.E.2d 807, 813 (2017) (internal citations omitted). "One asserting a facial challenge claims that the law is 'invalid *in toto* – and therefore incapable of any valid application.'" *Id*. (quoting *Steggel v. Thompson*, 415 U.S. 452, 474 (1974)). "Thus, unless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality." *Id*. at 503, 808 S.E.2d at 813 (internal quotations omitted). Furthermore, as noted by Appellant, the Supreme Court "is reluctant to find a statute unconstitutional," and "[e]very presumption is made in favor of a statute's constitutionality." *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002). "A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.'" *Id*. (quoting *Joytime Distribs. and Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)).

As such, the civil asset forfeiture statutes are only facially invalid if *all* forfeitures permitted by the statutes are unconstitutional. Instead of considering this question, the trial court conceived of circumstances where a particular forfeitures *could* be excessive and held that to be a sufficient showing that the statutes violate the Excessive Fines Clause. R. at 6-7. The trial court made no effort to demonstrate that the statutes are unconstitutional in all of their applications. The mere possibility of an abuse of discretion resulting in an unconstitutional outcome is inadequate to sustain a facial challenge. *See Doe v. State*, at 502-503, 808 S.E.2d at 813 ("One asserting a facial challenge claims that the law is 'invalid *in toto* – and therefore incapable of any valid application.'" and "Thus, unless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality."). This analysis falls far short of providing the statutes "every presumption in favor of" their constitutionality. *Knotts*, 348 S.C. at 6, 558 S.E.2d at 513. As such,

the trial court improperly analyzed whether South Carolina's civil asset forfeiture statutes are unconstitutional on their face.

Furthermore, courts confronted with similar questions have consistently upheld South Carolina's civil asset forfeiture statutes. For nearly 40 years, South Carolina courts have been faced with various questions regarding civil asset forfeiture. None have held South Carolina's civil asset forfeiture statutes are facially unconstitutional as the trail court did here. In 1981, this Court held in *Moore v. Timmerman* that innocent property owners were entitled to the opportunity to come forward and show why property seized in connection with criminal acts should not be forfeited, not that civil asset forfeiture is unconstitutional. 276 S.C. 104, 276 S.E.2d 290 (1981). In 1995, in *Ducworth v. Neely,* the Court of Appeals held that the statute required the innocent owners to prove that they lacked actual knowledge of the illicit use of the seized property, not that civil asset forfeiture is unconstitutional. 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995). In 1996, in *Medlock v. One 1985 Jeep Cherokee,* this Court laid out the burden of proof in civil asset forfeiture cases but did not hold that civil asset forfeiture is unconstitutional. 322 S.C. 127, 470 S.E.2d 373 (1996). In 2006, this Court reaffirmed the extent of the State's burden of proof in *Pope v. Gordon* but again did not hold that civil asset forfeiture is unconstitutional. 369 S.C. 469, 633 S.E.2d 148 (2006). In 2011, this Court laid out the current law regarding civil asset forfeiture in *Gowdy v. Gibson*. 391 S.C. 374, 706 S.E.2d 495 (2011). In *Gowdy,* the court held that "close proximity" as required by S.C. Code Ann. § 44-53-520(a)(8) must be decided on a case by case basis, not that civil asset forfeiture is unconstitutional. 369 S.C. at 381, 633 S.E.2d at 498. In 2013, this Court held that there was no duty for the Florence County Sheriff's Office to initiate forfeiture proceedings within a reasonable time, that the owner's sole remedy was to file an action for return of the property, and that law enforcement was not required to return the goods simply because the indictment was

dismissed, not that civil asset forfeiture is unconstitutional. *Farmer v. Florence County Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473 (2013). None of these cases support the proposition that civil asset forfeiture is unconstitutional.

The two federal district court cases relied on by the trial court and Respondent address other statutes. First, *Flora v. SW Iowa Narcotics Enforcement Task Force* addresses the forfeiture of $120,090 under the Civil Asset Forfeiture Reform Act, 18 U.S.C. § 983 ("CAFRA"). 292 F.Supp.3d 875 (S.D. Iowa 2018). CAFRA is a different law, so the holding of *Flora* is inapplicable to this case. However, it is notable that the court held the seizure of $120,090 did not violate the Fourth Amendment, and civil forfeiture was held not facially invalid under due process. 292 F.Supp.3d 875. In *Harjo v. City of Albuquerque*, the court was addressing the New Mexico civil asset forfeiture statute. 307 F. Supp. 3d at 1152. Again, this statute is distinct from South Carolina's civil asset forfeiture statutes and should not play into to the Court's consideration of South Carolina's statutes except to note that the court held that the program's funding by forfeiture funds was not a due process problem and that civil asset forfeiture is constitutional. The court did hold personal use of seized vehicles was a problem, but that is not allowed in South Carolina. *Id.* at 1209-10.

Neither Respondent nor Amicus ACLU cited to the federal district court case most persuasive and applicable to the present matter: *Pooler v. Wilson* from the District Court for South Carolina. 452 F. Supp. 3d 428. In *Pooler*, Judge Norton considered whether South Carolina's civil asset forfeiture laws violate the United States Constitution and expressly found them to be constitutional.[3] *Id.* at 436. Law enforcement seized $104,596 from Pooler's home after her ex-

[3] Because of limits placed upon his jurisdiction by concerns of federalism, Judge Norton only considered whether the statutes violated the federal constitution; however, as noted by Appellant, South Carolina's constitutional provisions have largely been interpreted to mirror the federal

boyfriend was charged with possession with intent to distribute narcotics. *Id.* at 431. The cash was in small bills bound together with rubber bands and hidden in a secret compartment beneath the bathtub with narcotics. *Id.* A circuit court judge held a hearing and determined the money to be proceeds subject to forfeiture. *Id.* Pooler then asserted that she was the legal owner of the currency and that the statutes were unconstitutional. *Id*. Finding Pooler had no evidence to support her claim of ownership, *id*. at 433, Judge Norton then turned to the constitutionality of the statutes writing:

> The Supreme Court has confirmed the constitutional legitimacy of state civil *in rem* forfeiture actions, noting that "state lawmakers, in the exercise of the police power, [are] free to determine that certain uses of property [are] undesirable and then establish a secondary defense against a forbidden use." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In that case, the Supreme Court explained that an individual who claims an interest in forfeited property is not denied due process by a state's *in rem* forfeiture of that property because the state has an important interest in ensuring that property is not used unlawfully. *Id.* In other words, the forfeiture is a judgment against the property and a legitimate exercise of a state's police power.
>
> Moreover, the Supreme Court has specifically addressed and rejected Pooler's argument that an *in rem* forfeiture statute unconstitutionally shifts the burden of proof to the innocent owner. Because an *in rem* action is initiated against property for a determination of whether that property was used illegally, the Supreme Court found that an innocent owner has no defense to the forfeiture where the property was found to be connected to criminal purposes. "It has long been settled that statutory forfeitures of property intrusted [sic] by the innocent owner or lienor to another who uses it in violation of [the law] is not a violation of the due process clause of the Fifth Amendment." *Van Oster v. State of Kansas*, 272 U.S. 465, 468, 47 S.Ct. 133, 71 L.Ed. 354 (1926). In other words, innocent ownership is irrelevant to the purported property owner's rights where the court determined that the property was used illegally. The Supreme Court has also considered and rejected Pooler's argument that the statutes "do not mandate judicial review or judicial authorization prior to or subsequent to the seizure." *See Calero-Toledo*, 416 U.S. at 680, 94 S.Ct. 2080 (1974) (finding that the postponement of a hearing until after a seizure of property does not deny due process where the property is tied to criminal purposes).[4] Therefore, the court finds that the South Carolina forfeiture statutes do not violate the Fourteenth Amendment's guarantee of due process.

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constitutional provisions, so his reasoning also applies to the question of constitutionality under the South Carolina constitution.

> Next, the court addresses whether the South Carolina statutes violate the Eighth Amendment's prohibition against unreasonable fines. The Supreme Court has held that a civil forfeiture is a form of punishment and therefore "subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Austin v. United States*, 509 U.S. 602, 622, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). The Eighth Amendment "bars the government from collecting excessive fines as punishment for an offense." *United States v. Blackman*, 746 F.3d 137, 144 (4th Cir. 2014). The Supreme Court has stated that "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional" under the Excessive Fines Clause. *United States v. Bajakajian*, 524 U.S. 321, 337, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). The Fourth Circuit "has distilled this standard to four factors: (1) 'the amount of the forfeiture and its relationship to the authorized penalty;' (2) 'the nature and extent of the criminal activity;' (3) 'the relationship between the crime charged and other crimes;' and (4) 'the harm caused by the charged crime.'" *Blackman*, 746 F.3d at 144 (quoting *United States v. Jalaram*, 599 F.3d 347, 355–56 (4th Cir. 2010)). On their face, the South Carolina forfeiture statutes do not violate Eighth Amendment doctrine. The court will not construe a statute in such a way that allows for a constitutional violation when no violation is shown. *See Rust v. Sullivan*, 500 U.S. 173, 191, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."). Moreover, the civil forfeiture of the currency in this case does not amount to an "excessive fine" under the Eighth Amendment. Because the *in rem* civil forfeiture proceeding was initiated based on the criminal behavior of Walker, the court considers whether the forfeiture amounts to an excessive fine based on his criminal activity. In relation to his arrest, Walker was charged with violating S.C. Code Ann. § 44-53-375 for trafficking cocaine and S.C. Code Ann. § 44-53-370 for trafficking marijuana. The former statute carries a maximum fine of $200,000 and the latter carries a maximum fine of $20,000. Therefore, the amount forfeited, $104,596.00, is not disproportional to the gravity of the Walker's offense. Thus, the forfeiture of the currency did not violate the Eighth Amendment. Thus, the court finds that Pooler's unconstitutionality cause of action fails to state a claim as it relates to the United States Constitution.

Id. at 437. Judge Norton considered nearly identical arguments to those presented here and found that South Carolina's civil asset forfeiture statutes do not violate the United States Constitution. *Id.* Respondents, their amici, and the trial court provide no argument which undermines the conclusions reached by Judge Norton.

The court should uphold well settled precedent and reverse the decision of the trial court because it failed to demonstrate that South Carolina civil asset forfeiture statutes are facially

unconstitutional. Moreover, the trial court's determination that South Carolina's forfeiture statutes violate both state and federal constitutions ignores facts that would justify the underlying forfeiture under any case-by-case measure of the constitutionality of the forfeiture sought here.

CONCLUSION

The trial court erred by ruling that South Carolina's civil forfeiture statutes are unconstitutional in their entirety. Appellant has thoroughly detailed why these statutes are well within constitutional bounds. The judiciary should therefore leave to the General Assembly any decision on how to implement South Carolina's civil asset forfeiture scheme. It is not the providence of the judiciary to substitute its policy preferences for those of South Carolina's democratically elected representatives. Notwithstanding that point, the Attorney General believes South Carolina's civil asset forfeiture statutes are grounded in sound policy considerations and correctly balance the various competing interests. If the court choses to evaluate the constitutionality of these statutes, the court must make every effort to uphold them before declaring them facially unconstitutional. The overwhelming weight of case law has upheld these statutes. It would strain credulity for the Court to now say that the every court which has allowed civil asset forfeiture to exist, albeit with limitations, was incorrect and that the laws are so plainly unconstitutional that no remedy is possible other than striking the statutes in their entirety. Moreover, under the case by case analysis which ought to be used in this case, case law supports the constitutionality of South Carolinas civil asset forfeiture statutes.

As a result, the Attorney General urges the Court to correct the error of the trial court and hold in favor of Appellant on all issues before it.

Respectfully submitted,

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