

No. _____

In the
Supreme Court of the United States

WANDA TUBBS,

Petitioner

v.

JEFF LONG,
AS COMMISSIONER OF TENNESSEE DEPARTMENT
OF SAFETY AND HOMELAND SECURITY,

Respondent

On Petition for Writ of Certiorari to
the Court of Appeals of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Tennessee courts violate due process by failing to let Wanda Tubbs litigate a motion to suppress in an asset forfeiture case?

RELATED PROCEEDINGS

In re: Dept. of Safety v. \$152,652 in U.S. Currency, 19.01-145268J (Commissioner of Safety 2018)

Tubbs v. Purkey, 18-C-2254 (Davidson County Cir. Ct. 2019)

Tubbs v. Long, M2019-00627-COA-R3-CV Slip Op. (Tenn. Ct. App. April 28, 2020)

Tubbs v. Long, M2019-00627-SC-R11-CV Order Denying Review (Sept. 16, 2020)

PARTIES TO THE PROCEEDING

The parties have been the same all along — Wanda Tubbs, and the Tennessee Department of Safety — although the case caption has changed slightly due, for example, to changes in which official runs that department. The parties are therefore listed in the caption above.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Wanda Tubbs asks for a writ of certiorari to review the judgment of the Tennessee Court of Appeals, for which the Tennessee Supreme Court denied discretionary review. In an asset forfeiture hearing, Tubbs was required to prove her innocent ownership of seized currency claimed to be drug money. An administrative judge denied her motion to suppress the fruits of a search warrant, and, after hearing all the fruits of that search, he ordered a forfeiture. When Tubbs then appealed the denial of the motion to suppress, the Court of Appeals declined even to rule on whether the Fourth Amendment was violated. Instead, the court held that since Tubbs had already lost the case on the merits, she never had any right to move for suppression of evidence, and thus the Fourth Amendment issue was "pretermitted." Pet. Appx. 21. Since the deprivation of the right to litigate a motion to suppress defies the Court's holding from *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) and violates precedent on an important question of law, Tubbs asks for certiorari.

OPINION BELOW

The opinion of the Tennessee Court of Appeals is currently unpublished, namely *Tubbs v. Long*, M2019-00627-COA-R3-CV slip op. (April 28, 2020) (Petition Appendix A).

JURISDICTION

The Court has statutory appellate jurisdiction under 28 U.S.C. § 1257(a).

The Tennessee Court of Appeals issued its opinion on April 28, 2020. Tubbs timely asked for rehearing on May 08, 2020, which was denied on May 14, 2020, and then she applied for review by the Tennessee Supreme Court on July 13, 2020. It denied her application on September 16, 2020. Pet Appx. 33a.

The normal period to appeal to this Court from the denial of discretionary review by a state supreme court is 90 days. Sup. Ct. R. 13. On March 19, 2020, however, the Court entered a standing order granting all petitions an automatic 60-day extension, for a total of 150 days. In this case, the 150th day falls on a weekend (February 13, 2021), and this petition is therefore due on the next business day. Sup. Ct. R. 30(1). The following Monday was a federal holiday. *See* 5 U.S.C. § 6103(a). This petition is being filed, timely, on Tuesday February 16, 2021.

CONSTITUTIONAL PROVISION

Fourteenth Amendment, § 1

. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

Deputies from the Cannon County Sheriff's Department executed a search warrant at a house owned by Wanda Tubbs, where her son and the son's girlfriend were renting. Pet. Appx. 3a-4a. Police seized multiple sets of currency, along with a significant quantity of illegal drugs. The son, Terrance Martin, and the girlfriend, Shaundra Smith, were charged with drug offenses. Pet. Appx. 3a and 5a. The Sheriff's Department filed paperwork to forfeit all the sets of currency found in the home. Pet. Appx. 5a.

At the forfeiture hearing, Wanda Tubbs testified that one of the sets of currency, specifically the money contained in a Michael Kors bag, was not drug money but was actually her life savings which she left at the house. *Id.* at 87a-88a, 94a. She testified that she originally won a large quantity of money (more than \$200,000) from a court judgment, and also from a Social Security administrative judgment awarding backpay. *Id.* She testified that she did not trust banks, but typically stored her wealth at her own residence. *Id.* at 97a and 105a-106a. Whenever she was leaving town for vacation, though, she would leave the money with a relative instead. *Id.* at 94a-95a. In total, three witnesses testified for Tubbs: The petitioner Wanda Tubbs, her son Terrance Martin, and Martin's girlfriend's son Isaac Smith ("I.S."). *See id.* at 17a.

Citing among other things that drugs were found at the location and their proximity to the currency, as well as a purported physical comparison between the

contested money and the other sets of (apparent) drug money, the administrative judge ruled that the money did not really belong to Tubbs. Order 3-4. Instead, he said that it was all drug money. *Id.* at 44a-46a. He ordered forfeiture of the currency. *Id.* at 49a.

Prior to this ruling on the merits, the administrative judge had denied a motion to suppress all evidence derived from the house. *Id.* at 34a-41a. The search warrant for the house was based on an affidavit claiming that another Cannon County deputy — not the affiant himself — had smelled fresh marijuana at the front door, the night before the raid, while serving a civil summons. *Id.* at 57a. It also claimed that the affiant himself had investigated a burglary at the home months prior, and at that time had found a large quantity of marijuana at the residence. *Id.* at 56a-57a.

Moving to suppress the fruits of the search warrant, Tubbs argued that both statements were intentionally or recklessly false, citing among other authorities *Franks v. Delaware*, 438 U.S. 154 (1978) (Allowing motion to suppress a search resulting from a fraudulent search warrant). Pet. Appx. 60a-63a. At the hearing, home occupants Isaac Smith and Terrance Martin testified that the house did not really smell like marijuana the night prior to the raid, as alleged. *Id.* at 64a-82a. The deputy who originally claimed otherwise, whose name was Deputy Brandon King, did not testify. The search warrant affiant, Investigator Brandon Gullett, then conceded that months prior to the raid, the purportedly "large amount" of

marijuana that he found was literally only a handful. *Id.* at 85a. When questioned about why he swore that it was a large amount, he said that he views any amount of drugs as a large amount. *Id.* at 86a.

The administrative judge ruled that the statement about the large amount of marijuana was not false. *Id.* at 37a-38a. He ruled that it did not even matter whether the house really smelled like marijuana, because police officers are allowed to lie to each other to establish probable cause. *Id.* at 39a-41a. Finally, he ruled that Tubbs had no Fourth Amendment "standing" to claim violations against the house that she owned since she only rented it to her son, instead of living there. *Id.* at 41a.

Later appealing the forfeiture ruling, Tubbs argued among other things that the Fourth Amendment issues were wrongly decided. *Id.* at 6a.

Ultimately, the Court of Appeals refused to address the Fourth Amendment issues. *Id.* at 20a-21a. Instead, the court held that Tubbs had no right to litigate any motion to suppress because the administrative judge had ultimately found — i.e., after denying the motion to suppress, and admitting all the drugs and other inculpatory evidence — that the money was not hers. *Id.* at 20a-21a.

Prior to this point, no one had challenged Tubbs's right to file a motion to suppress. Therefore, Tubbs moved for rehearing, expressly citing *One 1958 Plymouth v. Pennsylvania*, 380 U.S. 693 (1965), for the position that she had a right to move for suppression of evidence, and that the court could not rule against her

based on the fruits of a contested search without first deciding whether it was constitutional. *See* Pet Appx. 23a and 26a. The petition to rehear was denied without substantive comment. *Id.* at 32a.

Tubbs appealed to the Tennessee Supreme Court, again seeking reversal. The court took no helpful action, however, denying review without comment. *Id.* at 33a.

REASONS FOR GRANTING THE WRIT

The Tennessee courts denied due process by not letting Wanda Tubbs litigate a motion to suppress in her asset forfeiture case. The Tennessee Court of Appeals effectively denied the existence of the exclusionary rule in asset forfeiture hearings, by requiring a claimant first to win her hearing *with* all the unlawful evidence before gaining the right to suppress such evidence. In other words, under this strange procedure, a motion to suppress would serve no purpose because the claim would already be over and the claimant victorious. This new Tennessee procedure nullifies the federal right to due process.

Notably, Tubbs is not actually raising the Fourth Amendment claim before this Court, given that the lower appellate courts never addressed it. Instead, she is simply asking that the Court direct the lower courts, as a matter of due process (and/or privileges and immunities), to rule on the Fourth Amendment claim, and to grant her a new and untainted trial should the motion to suppress be granted. However, for what it's worth, Tubbs's Fourth Amendment claim is indeed plausible.

Namely, the administrative judge held that police officers may fabricate evidence to establish probable cause, but such holding is flatly contradicted by *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971). Further, the administrative judge's holding that Tubbs had no privacy interest in a house that she *owned* is seemingly foreclosed by cases such as *United States v. Jones*, 132 S.Ct. 945, 951-53 (2012). In that case, the Court held that a physical trespass against property gives rise to a Fourth Amendment claim by the owner. *Id.*

A. The lower court committed serious and flagrant constitutional error

As for the main issue, due process, this Court has long extended criminal law protections from the Constitution to asset forfeiture trials. As far back as the Nineteenth Century, this Court has held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." *Boyd v. United States*, 116 U.S. 616, 634 (1886). In *Boyd*, the Court held that the Fourth and Fifth Amendments justified the grant of a new trial with the suppression of the illegally gained evidence. *Id.* at 638. Later, in *One 1958 Plymouth Sedan v. Pennsylvania*, the Court clarified and re-articulated that the criminal-law exclusionary rule does indeed apply in state asset forfeiture proceedings. 380 U.S. 693 (1965). Although the Court has denied application of the exclusionary rule in some other contexts, such as lawsuits against the government,

see *United States v. Janis*, 428 U.S. 433 (1976), it has never denied its application to a forfeiture case. More recently, the Court has further held that the excessive fines clause applies in state asset forfeiture proceedings, again underscoring the punitive and quasi-criminal nature of such proceedings. *Timbs v. Indiana*, 139 S.Ct. 682 (2019).

The plain holding from *One 1958 Plymouth Sedan* would seem to end the discussion in Tubbs's favor. In that case, the Court broadly held that "the results of [a] search . . . which violates the Fourth Amendment" may not be used to "sustain a forfeiture." *One 1958 Plymouth Sedan*, 380 U.S. 693, at 698 (internal citation omitted). If illegally seized evidence may not rightly sustain a forfeiture, then the State of Tennessee was wrong to use evidence against Petitioner Tubbs without ever ruling on her Fourth Amendment issue before addressing the merits. Notably, the issue of constitutional harmless error asks whether there is any reasonable doubt about whether a constitutional violation affected the outcome. *Chapman v. California*, 386 F.3d 18 (1967). Here it cannot plausibly be said that the error did not affect the outcome.

B. Due-process rights for asset forfeiture proceedings are a question of importance

Boiled down, the basic question is thus whether the exclusionary rule *really* applies to a forfeiture hearing. Apparently arguing that the answer is "No," the government would now advocate for some sort of new exception, albeit an exception

that is hardly explained. Neither the State of Tennessee nor its court system has clearly articulated what specific, proposed exception they even desire. Assuming that the government's proposed new exception would be that the exclusionary rule should not apply when considering proof of ownership, then not only is the exception unsupported by any authority, but it would be impossible to apply in practice. Typically the court will (as here) consider the proof of ownership at the same time as the proof of the drug dealing. The issues are practically and legally inseparable. *See* Tenn. Code Ann. § 53-11-201(f)(1)(A)-(B) (requiring proof by the claimant on both issues).

Finally, the question presented is important because, without review, the Court would simply be letting the courts of Tennessee defy this Court's precedent. Rule 10(c) of this Court specifically authorizes certiorari where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Alternatively, even if this Court *did* find that the Court of Appeals has articulated some meaningful, arguable exception to application of the exclusionary rule, then this case would still fall into the category of cases where "a state court . . . has decided an important question of federal law that *has not been, but should be*, settled by this Court[.]" *See id.* (emphasis added). Certiorari is justified either way.

For one thing, this case holds importance because Tennessee is not the only jurisdiction that has been evading the Court's jurisprudence on asset forfeitures.

The courts of California and Texas — the two biggest states in the country — have held outright that the exclusionary rule does not apply in asset forfeiture hearings at all. *People v. \$241,600 United States Currency*, 67 Cal.App. 4th 1100, 1113 (1998); *State v. One (1) 2004 Lincoln Navigator*, 494 S.W.3d 690, 697-698 (Tex. 2016). At least one federal judge has likewise questioned the validity of this Court's precedents on this topic. *United States v. Marroco*, 578 F.3d 627, 642 (7th Cir. 2009) (Easterbrook, J., concurring). To allow the due-process protections that this Court has historically guaranteed in quasi-criminal proceedings to be outright ignored by multiple states would undermine the authority and preeminence of this Court.

Further, some jurists have already questioned the ongoing validity of asset forfeiture in light of an argued deficiency of due process. *See, e.g., Leonard v. Texas*, 137 S.Ct. 947 (2017) (Thomas, J., Statement on denial of certiorari).¹ The ruling today would undermine due process even further, make wrongful forfeitures by the states even easier, and disrespect the previous civil rights precedents authored by this Court.

Finally, the question here is cleanly presented such that the Court could easily resolve the matter without any trouble. Namely, the fact that the lower appellate court never even ruled on the motion to suppress makes the whole Fourth Amendment issue unnecessary (and inappropriate) for this Court to resolve. The

¹ Unlike that case, the Fourteenth Amendment error in this case was initially brought about by the Court of Appeals. Petitioner Tubbs then asserted the federal error in a petition to rehear, and again in a petition to the Tennessee Supreme Court. She has raised the federal issues as soon as they arose.

Court could potentially even resolve the whole case through summary disposition, simply remanding the case with directions to evaluate the motion to suppress, and, if the motion be granted, to apply the exclusionary rule.

CONCLUSION

Petitioner Wanda Tubbs asks that the Court grant the writ of certiorari.

Respectfully submitted,

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