No. 22-6516 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



ABRAHAM A. AUGUSTIN — PETITIONER
(Your Name)

vs.

TENNESSEE DEPARTMENT OF SAFETY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS OF TENNESSEE
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ABRAHAM A. AUGUSTIN, Reg. No. 42542-074
(Your Name)

Federal Correctional Complex-Medium, P.O. Box 1032
(Address)

Coleman, FL 33521
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

I. WHETHER THE FORFEITURE OF AUGUSTIN'S PROPERTY COMPORTED WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. WHETHER MODERN CIVIL-FORFEITURE STATUTES CAN BE SQUARED WITH THE DUE PROCESS CLAUSE AND OUR NATION'S HISTORY?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF AUTHORITIES CITED

### CASES



### STATUTES AND RULES



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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the State Trial (Chancery) court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was May 17, 2022. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: June 6, 2022, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT: No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated Section 4-5-102. See Appendix E

T.C.A. § 4-5-322. See Appendix F

T.C.A. § 39-11-708. See Appendix G

T.C.A. § 40-33-201. See Appendix H

T.C.A. § 40-33-202. See Appendix I

T.C.A. § 40-33-203. See Appendix J

T.C.A. § 40-33-204. See Appendix K

T.C.A. § 40-33-205. See Appendix L

T.C.A. § 40-33-206. See Appendix M

T.C.A. § 40-33-213. See Appendix N

T.C.A. § 40-33-215. See Appendix O

T.C.A. § 53-11-201. See Appendix P

T.C.A. § 53-11-451. See Appendix Q

## I. QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FORFEITURE OF AUGUSTIN'S PROPERTY COMPORTED WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II. WHETHER MODERN CIVIL-FORFEITURE STATUTES CAN BE SQUARED WITH THE DUE PROCESS CLAUSE AND OUR NATION'S HISTORY?

## II. JURISDICTION

Augustin filed a Petition for Judicial Review regarding the forfeiture of his property without due process on December 10, 2019, in the Chancery Court of Davidson County, Tennessee. The Chancery Court for Knox County dismissed the petition on June 10, 2021. The Court of Appeals of Tennessee affirmed the chancery court's decision on May 17, 2022. A petition for rehearing was timely-filed and denied on June 6, 2022. A permission to appeal to the Tennessee Supreme Court was sought and denied on November 17, 2022. This Court has jurisdiction pursuant to Rule 10(c) of the Supreme Court of the United States due to the Tennessee Court of Appeals' decision on an important federal question in a way that conflicts with relevant decisions of this Court.

## III. INTRODUCTION

This case presents a plethora of statutory and constitutional violations by all parties involved in the seizure and forfeiture process. Those violations may be divided into three categories: (I) Pre-forfeiture warrant violations, (II) Interim-forfeiture warrant violations, and (III) Post-forfeiture warrant violations.

The pre-forfeiture warrant violations show a knowing, willful, and reckless disregard for the forfeiture statutes and Due Process Clause by the seizing agency, the Bradley County Sheriff's Office ("BCSO"):

(1) On December 3, 2009, during his arrest for offenses not giving rise to forfeiture and not finding any drugs on Augustin or in his vehicle, the BCSO manufactured drugs and amounts to seize property. Notice all property seizure notices differ on the type and amount of drugs found. The December 3, 2009, seizure notice of the $847 in cash alleged 4 ounces of cocaine (K0986N), while the December 3, 2009, BMW vehicle seizure notice doubled the cocaine amount to 8 ounces (K0993). The December 9, 2009, seizure notice of the $9,850 in cash alleged 4 ounces of cocaine but also fabricated a half-ounce of marijuana (K0992N), while the affidavit used to obtain the forfeiture warrants alleged it was 1/4 kilogram or 9 ounces of coaine. Each seizing officer fabricated a drug and amount. This violated Tennessee Code Annotated Section 53-11-451(b) and the Due Process Clause.

(2) BCSO Detective Heath Arthur, who seized the BMW vehicle on December 3, 2009, would later falsify the vehicle's seizure date on the Seizure Notice to December 14, 2009 (Appellate Technical Record "T.R." I, 14). Det. Arthur also falsified the seizure date on the vehicle's property inventory receipt (T.R. I, 102). The vehicle's ORDER OF FORFEITURE also revealed the false seizure date (T.R. I, 105). However, in Det. Arthur's synopsis submitted in the federal criminal discovery, he would admit the vehicle was truly seized on December 3, 2009 (T.R. I, 106). Notice the $847 in cash that Det. Arthur also admitted in his synopsis was seized on the same date as the vehicle revealed the December 3, 2009 seizure date (T.R. I, 107). As a result, the BMW's forfeiture warrant was procedurally and statutorily defective since it was obtained in direct violation of the maximum five business days and ten additional days, in violation of T.C.A. §§ 40-33-203 and 40-33-204 and the Due Process Clause.

(3) BCSO Detective Jimmy Smith wrote a false address on the Notice of Seizure for the $9,850 cash (K0992) seized on December 9, 2009, which caused the forfeiture warrant and order to be mailed to a non-existing (560 Westside Dr.) address in Winston-Salem, North Carolina.

(4) BCSO Detective Jimmy Smith, who also filed the affidavit for the issuance of all forfeiture warrants, knowingly and intentionally included numerous perjured statements for the probable cause in the affidavit, in violation of § 40-33-204(b) and the Due Process Clause. Those perjured statements were identified in a pleading filed in the chancery court (T.R. I, 89-90).

(5) BCSO Detective Carl Maskew lacked the probable cause to seize the U-Haul rental truck with its contents on December 9, 2009 (T.R. I, 113). No forfeiture warrant was ever applied for the truck's contents nor were they ever returned. They are still missing and assumably still in the BCSO's custody 13 years later. Notice the empty signature in the section for the "DISP[OSITION]:" and the person the contents were "RELEASED TO:" (T.R. I, 120). This violated § 40-33-204(h) and the Due Process Clause.

The interim-forfeiture warrant violations showed a series of violations by the judge, Amy Reedy, who issued the forfeiture warrants in Bradley County:

(6) Bradley County Judge Amy Reedy failed to require the affiant or seizing officers to establish either of the two elements in § 40-33-204(c)(2)(A) and (B) to except the five-day requirement for the issuance of the forfeiture warrants. The seizing officers knew Augustin was the property owner (as the property was seized in his possession) and he was in their custody since December 9, 2009. No extraordinary circumstances existed.

(7) Judge Amy Reedy failed to conduct the ex parte hearing on December 22, 2009, for the BMW vehicle's forfeiture warrant, creating a statutory defective warrant and violating § 40-33-204(b). The Bradley County Clerk of Court informed Augustin of this in a letter that was introduced to the chancery court (T.R. II, 186 & 191-92)--but missing from the Appellate Record--and attached as Exhibit A to the initial Appellant Brief.

The post-forfeiture warrant violations also showed a series of violations by the Appellee, the Tennessee Department of Safety ("Department"), tasked with

the forfeiture of property of those accused of violating the Tennessee Drug Control Act:

(8) The Department of Safety failed to notify Augustin that a forfeiture warrant had been issued before the forfeiture of his property, in violation of § 40-33-204(b) and the Due Process Clause.

(9) The Department failed to serve Augustin his forfeiture orders to grant him the final opportunity to contest the forfeiture of his property in time.

Taking into consideration the documented violations above, it is in direct contravention of controlling Tennessee and U.S. Supreme Courts precedents that the forfeiture could have been approved of by the chancery court and court of appeals.

> Where the conditions prescribed for forfeiture ... have not been complied with, ... no forfeiture or confiscation has occurred. The State's failure to prove its compliance with the procedural requirements of the forfeiture statutes in this case requires us to vacate the forfeiture.

State v. Sprunger, 458 S.W.3d 482, 500 (Tenn. 2015).

> The Due Process of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law." From these "cryptic and abstract words," we have determined that individuals whose property interests are at stake are entitled to "notice and an opportunity to be heard."

Dusenbery v. United States, 584 U.S. 161, 167, 151 L. Ed. 2d 597, 122 S. Ct. 694 (2002) (quoting United States v. James Daniel Good Real Property, 510 U.S. 43, 48, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993)).

## IV. STATEMENT OF THE CASE AND FACTS RELEVANT TO THE QUESTIONS PRESENTED

The relevant facts necessary to frame the questions presented for review were stated in the Court of Appeals opinion, but they are provided here for the convenience of this Court.

Following the seizure of Augustin's property on December 3, 2009, during his arrest for state kidnaping and robbery, and on December 9, 2009, during his federal arrest for the same state-originated-kidnaping, Augustin was transported from the arrest location to the Bradley County Justice Center ("BCJC") where he would be housed pending

trial on federal charges. The BCJC is one of the three departments located inside one building comprising the Bradley County Judicial Complex: the justice center (jail), the sheriff's office, and criminal court that issued the forfeiture warrants. Augustin would remain in the BCSO's custody from December 9, 2009, until a week after his March 10, 2011, sentencing in federal court. During his stay in the BCSO's custody, Augustin never received any notice from the BCSO nor the Department of Safety that a forfeiture warrant had been issued for his seized property.

Since Tennessee had dismissed all criminal charges two days after his December 9, 2009, federal arrest and only the United States prosecuted and convicted Augustin, on September 15, 2015, Augustin filed a motion for the return of all seized property in federal court pursuant to Fed. R. Crim. P. 41(g). In mid-November 2015, the United States complied with the district court's order to investigate the outcome of the property and submitted to the court and Augustin a copy of the documents showing the property had been forfeited in 2010 and 2011. There was no fair--due process--notice in the procedure. These documents were not served as documents in a forfeiture proceeding, thereby, informing Augustin he had a specific time period to file a claim nor was Augustin made aware that his orders of forfeiture---regarding property already forfeited without due process five years and 11 months prior---were still valid. Once the forfeiture documents were provided, the federal proceeding continued.

Augustin filed an original action in the Bradley County Circuit Court in February 9, 2016, against the BCSO. The action was dismissed for lack of subject matter jurisdiction. Following an appeal, the action was reversed and remanded in a published opinion, Augustin v. Bradley County Sheriff's Office, 598 S.W.3d 220 (Tenn. Ct. App. 2019). Due to a lack of notice being provided in this case, Augustin filed a claim with the Department of Safety. The claim was denied on December 5, 2019, stating the Department refused to "process your petition because it was untimely" and,

> According to our records, you were sent notification on January 13, 2010, but the letter was returned to our office on March 3, 2010. Therefore, your petition is

> rejected as untimely, and your interest in the subject property has not been protected.

See T.R. I, 36.

The notice failed to clarify the "notification" was sent to a North Carolina address while Augustin was being incarcerated by the BCSO in Cleveland, Tennessee. Furthermore, notice that no other reason was provided other than that notice was sent but returned--thus, the claim was untimely--which is confusing and contradictory since the Department admits that no notice was ever provided--and the property was therefore forfeited without due process--but still refused to reverse and vacate the forfeiture.

On December 10, 2019, Augustin filed a Petition for Judicial Review in the Chancery Court for Davidson County. On August 5, 2020, the case was transferred to the Knox County Chancery Court. In the Department's response to the petition, for the first time, the Department used the published Augustin opinion (against the BCSO) to argue the Court of Appeals had already decided that a judicial review had not been filed within sixty days of receiving notice by the United States. Since this issue was not raised by neither Augustin nor the BCSO and the Court of Appeals addressed this on its own, no argument was ever presented for or against the possible interpretation of a filed original action (in a circuit court) against the BCSO instead as a petition for judicial review against an unintended and unnamed party, the Department of Safety, in a chancery court.

But one thing made clear by the published opinion was:

> Thus, it appears that the question of whether notice comported with due process so as to trigger the thirty day period for filing a claim should be litigated in the agency.

Augustin, 598 S.W.3d at 232.

But when this issue was litigated in the agency, and relief was denied, and Augustin filed a judicial review, the chancery court used the Augustin published opinion as its sole authority to contradict the statutory and constitutional provisions to deny relief. The Court of Appeals has also erroneously adopted that faulty position.

## V. SUMMARY OF THE ARGUMENT

I. The Tennessee Court of Appeals erroneously decided the forfeiture of Augustin's property in 2010 and 2011 that occurred without fair-due process--notice was legal. While admitting the record failed to show the State provided notice before the forfeiture of the property in 2010 and 2011, the Court of Appeals erroneously concurred with the chancery court that the United States providing Augustin with copies of the documents of the illegal forfeiture--during a federal proceeding in 2015--satisfied the statutory notice that comport with due process to trigger the thirty-day time period to file a claim. Consequently, the court ruled Augustin failed to file the petition for judicial review within sixty days of receiving proper notice. Such a decision is legally flawed and unconstitutional on several grounds: (1) the United States cannot provide notice for another sovereign, Tennessee, during that State's forfeiture proceedings because neither sovereign's statutory provisions allow either to provide notice that comport with statutory and substantive provisions for the other; (2) even if such notice could be provided by the United States, since the property was seized in December 2009 and illegally forfeited in 2010 and 2011 and the United States was alleged to have provided notice in 2015, the so-called notice--regarding property already forfeited without due process--occurred 11 months after the five-year statute of limitations expired; and (3) the petition for judicial review could not be filed within 60 days of the forfeiture of the property in 2010 and 2011 since Augustin never received notice within 60 days of the issuance of the forfeiture order. Nor could the review be filed within 60 days of the United States providing Augustin the forfeiture documents in 2015 since the forfeiture of property did not meet the very definition of a contested case that a judicial review is for. State and federal statutes both define a contested case as one **after** an opportunity for a hearing has been provided. The forfeiture is not a contested case. The court's decision is erroneous.

II. The Tennessee Chancery Court and Court of Appeals never addressed this issue challenging the constitutionality of the State's forfeiture statutes, although it was raised at every stage during the litigation. Tennessee forfeiture statutes are unconstitutional for many reasons: First, they allow the forfeiture of property to begin even when there is no criminal conviction for an offense giving rise to forfeiture or the criminal offense has been dismissed. And in instant case they allow forfeiture for drug offenses even when the property owner was never even criminally charged with nor arrested for drug offenses. Such procedures alone fail to comport with due process and our Nation's history. The forfeiture statutes create grey areas for corrupt officers to seize property unlawfully, out of greed, for profit as this Court has documented. Generally, modern civil forfeiture statutes have become a means for legal plunder. They do not provide the necessary due process protection to prevent the deprivation of property without due process. These statutes are enacted to give officers every technicality in an arsenal of almost unlimited tactics to seize property without any judicial oversight and deprive property owners of fair-due process-notice before depriving said owners of their property. Having become a means to pillage poor and vulnerable communities these statutes do more harm than good. In fact, our Nation's history does not support this during its founding. Outside of a limited class of crimes, such as piracy, forfeiture of one's property was unheard of. The architect of our Constitution would be horrified at our modern civil forfeiture statutes, such as Tennessee's, that allow forfeiture of property for drug offenses even when there was no drugs found, no arrest for a drug offense, and never any probable cause to have arrested the property owner for a drug offense. This is a fairly recent phenomenon that has been antithetical to the Due Process Clause and must change. Under the current precedent of this Court analyzing laws that criminalize rights and conduct covered by the Constitution, one must examine if the right is covered by the Constitution, and if so, how have the founding fathers addressed this issue in the past. Under this standard, modern civil forfeitures are illegal.

## VI. BACKGROUND OF THE ISSUES AND REASONS FOR GRANTING THE PETITION

WHETHER THE FORFEITURE OF AUGUSTIN'S PROPERTY COMPORTED WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

A. Preservation of the issue

Augustin first raised this issue in the initial claim filed to the Department of Safety on November 4, 2019 (T.R. I, 12-13), then in the petition for judicial review on December 10, 2019, and expounded in several court filings in the chancery court. On appeal, this issue was raised separately as six issues: Claim 1-6. This issue was also raised in the petition for rehearing and preserved in the application for permission to appeal to the Tennessee Supreme Court. This issue was raised and preserved at every stage.

B. Ressons for granting the petition

The first issue presented for consideration pertains to the procedural review of the State and whether it followed the procedures set out by the Tennessee legislature and U.S. Constitution. Augustin asserts the Department did not follow the procedural requirement of the forfeiture statutes and in the process violated his constitutional-Due Process-right.

The State could not deny that no notice was ever provided throughout the actual forfeiture proceeding, that is, before the State forfeited the property in 2010 and 2011. After all, forfeiture records reveal the Winston-Salem, North Carolina addresses the notices were fraudulently mailed to for service while Augustin was incarcerated by the very property-seizing-agency. The property was therefore forfeited without any fair-due process-notice. This issue is admitted by all parties.

The problem comes in once Augustin challenged the illegal forfeiture in the judicial review. The Department argues that once Augustin received the forfeiture documents from the United States during a 2015 federal proceeding, he was thus "served" the documents and had sixty days from that moment to file a judicial review. Therein lies

several flaws to this argument. The Order of Forfeiture issued for all property reveals this issue. Take for example the Order of Forfeiture for the BMW vehicle (T.R. I, 105). Besides the already pointed out fact that the seizing officer falsified the vehicle's seizure date from December 3 to December 14, 2009, on all seizure documents (T.R. I, 103 & 105), but later admitted in his own synopsis the December 3, 2009, seizure date (T.R. II, 198) was the true seizure date, the vehicle's order of forfeiture is statutory defective. And in order to apply for the order of forfeiture, the State had to use fraud. The vehicle's order of forfeiture stated the vehicle was

> confiscated pursuant to T.C.A. § 53-11-201, et seq. and § 40-33-201, et seq., ... that notice of seizure and of the issuance of the warrant was given or was reasonably attempted as required by T.C.A. § 40-33-204 and § 40-33-204, and that NO PETITION has been filed by any person asserting a claim to, or proof of security interest in, the above described PROPERTY within 30 days of receiving such notice(s) as required by Tennessee Code Annotated § 40-33-205 and § 40-33-206.

See T.R. I, 105.

Although this will be expanded in depth later, no notice was given or even reasonably attempted nor did the notice--that the State claimed the United States provided--comply with that required by "§ 40-33-205 and § 40-33-206." Id.

However, along with this Order of Forfeiture was an "attached sheet for Notice of Legal Rights regarding this order." Id. Although this document was not introduced to the chancery court by Augustin, it is part of the forfeiture record of the Department. The Notice of Legal Rights informs the property owner that in order to contest the forfeiture of his property, depending on his timing of action, he has 3 options: (1) the first is a petition for stay if filed within seven days of the entry date of this order; (2) a petition for reconsideration if filed within fifteen days of the entry date of this order; and (3) a judicial review to be filed within sixty days of the entry date of this order. In the case of the BMW vehicle, this "entry date" was "April 15, 2011."

Even though the Notice of Legal Rights informed the property owner all avenues of relief had to meet the timeline provided, and by November 2015 when Augustin received

the documents from the United States years had passed and he could not qualify for any of the relief, the State claimed the United States provided the notice that comported with due process to trigger the time to file a claim--obviously ignoring the words "entry date of this order" clearly written as a qualifying barrier for all avenues of relief, which Augustin did not meet.

The forfeiture of Augustin's property violated the Due Process Clause and three points will be made to support this factual assertion:

1. The United States cannot provide notice--that comports with due process to trigger the time to file a claim--for Tennessee in State forfeiture proceedings.

As an initial note, Tennessee Code Annotated Section 53-11-451 addresses and authorizes the seizure and forfeiture of property used in the facilitation of the sale of drugs--the reasons alleged for the seizures. In the State of Tennessee, when a defendant's property is seized for violation of the Drug Control Act, the procedures outlined in § 40-33-201 et seq. require the seizing officer to seek a forfeiture warrant within five business days (and may be granted an additional ten days) to apply for a forfeiture warrant. Following the requirements that the seizing officers are to follow, which were not, these violations were documented in the Introduction section of this Petition, the property owner cannot pursue the return of his property, nor even contest the seizure, until he is served with notice that a forfeiture warrant has been issued. In order for this notice to occur, once the forfeiture warrant is issued, it is forwarded to the applicable agency tasked with administering the forfeiture proceeding (for the particular violation enabling the forfeiture) to then provide notice to the property owner. As to the exact procedure, § 40-33-206 exclusively sets and controls the procedure for service and identifies the sole party responsible for this service:

> Any person asserting a claim to any property seized ... may within thirty (30) days of being notified by the applicable agency that a forfeiture warrant has been issued, file with the agency a written claim requesting a hearing and stating the person's interest in the seized property for which a claim is made.

T.C.A. § 40-33-206(a). See Appendix M.

The applicable agency referred to in § 40-33-206 is also defined by legislature.

> Applicable agency means the agency, board, commission or department charged by law or permitted by agreement with conducting the forfeiture proceeding for the particular property seized.

T.C.A. § 40-33-202(1). See Appendix I.

Furthermore,

> The applicable agency for property seized under the Drug Control Act, section 53-11-451, is the Tennessee Department of Safety.

Augustin, 598 S.W.3d at 229.

Under the statutory established administrative process, and specifically in drug cases, the State legislature has vested the Department of Safety with the exclusive role to provide notice to a property owner that a forfeiture warrant has been issued to trigger the time to file a claim. The statutory scheme does not encompass another sovereign, the United States, since "the states are separate sovereigns from the Federal Government and [and from one another]." Puerto Rico v. Sanchez Valle, 195 L. Ed. 2d 179, 193 (2016).

Only the Tennessee Department of Safety may provide notice that comport with due process and § 40-33-206 to trigger the time to file a claim. Pursuant to that statute, that procedure is the only process by which notice can be provided, and the time to file a claim may begin. This is absolutely clear from § 53-11-451, § 40-33-202(1), and § 40-33-206(a), applicable during the relevant time period concerned in this matter.

The U.S. Attorney's Office for the Eastern District of Tennessee, which provided Augustin copies of the forfeiture documents of the illegal forfeiture that occurred five years and 11 months prior, is not an agency or department charged by law or permitted by agreement with conducting Tennessee forfeiture proceedings. Conversely, in a similar case dealing with a federal forfeiture proceeding, federal law explicitly clarified that the federal Administrative Procedures Act does not apply to state agencies. The U.S. Court of Appeals for the Sixth Circuit stated:

> The Administrative Procedures Act (APA) provides for judicial review only for persons

> suffering legal wrong because of agency action, adversely affected or aggrieved by agency action within the meaning of a relevant statute. 5 U.S.C. § 702. Because the term "agency" is defined as "each authority of the Government of the United States," the APA does not apply to state agencies. 5 U.S.C. § 701(b)(1).

Sw. Williamson Cty. Cmty. Ass'n v. Slater, 173 F.3d 1033, 1035 (6th Cir. 1999).

Federal Court have ruled that the federal APA does not apply to the states nor their agencies. Conversely, the Tennessee APA cannot and does not apply to the federal government nor its agencies as well. Therefore, the United States cannot provide the notice needed to comply with both the procedural and substantive requirements in § 40-33-206 to comport with the Due Process Clause to trigger the time to file a claim.

2. Even if the United States could provide notice that comports with due process to trigger the time to file a claim, such notice occurred eleven months past the expiration of the five-year statute of limitations.

The applicable statute that controls the statute of limitations, T.C.A. § 39-11-703(c), prescribes that the forfeiture shall be commenced within five (5) years after the conduct giving rise to forfeiture terminates or the cause of action accrues, whichever is later. See Appendix G.

Both seizures occurred in early December 2009. Therefore, the Department had five years to consummate-with due process-the forfeiture. The statute of limitations expired in December 2014. Thereby, even if November 2015 could be taken as the date of service, which it is not, it was still unconstituionally and statutorily defective since the statute of limitations had already expired.

It is Augustin's position that the Federal Government cannot provide statutory notice that comports with due process to trigger the time to file a claim, but even if it could, such a notice occurred five years and eleven months after the property seizure. That is eleven months after the statute of limitations expired and, thus, too late.

3. The forfeiture of Augustin's property is not a contested case to be remedied by a judicial review.

As an initial note, T.C.A. § 4-5-322(a)(1) specifically addresses and limits exactly

who can file a judicial review. The procedure regarding the judicial review requires the petitioner to meet two elements: The case must be a contested case and the decision must be final. T.C.A. § 4-5-322(a)(1) states:

> A person who is aggrieved by a **final decision** in a **contested case** is entitled to judicial review under this chapter, which shall be the only method of judicial review.

Id. See Appendix F.

Fortunately for this Court, the Tennessee legislature has also defined and codified the exact meaning of a contested case already:

> Contested case means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency **after an opportunity for a hearing**.

T.C.A. § 4-5-102(3). See Appendix E.

In order to constitute a contested case, as defined by statute, before the proceeding begins, the agency is required by statutory and constitutional provisions to give the property owner an opportunity for a hearing. In Redd. v. Tenn. Dep't of Safety, 895 S.W.2d 332 (Tenn. 1995), the State Supreme Court elaborated on this very principle:

> One of the basic constitutional guarantees, procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Tennessee Constitution, prohibit the forfeiture of private property without first providing those with an interest in the property to a hearing held at a reasonable time and in a meaningful manner. Notice must be given in a manner reasonably calculated to notify all interested parties of the pending forfeiture of the property in order to afford the opportunity to object to the State's taking. One of the essential elements of due process in the confiscation and forfeiture of private property is adequate notice to all interested parties.

Id. at 334-35 (citations omitted).

Considering Augustin was incarcerated in Cleveland, Tennessee, by the BCSO (that seized the property), the notice sent to North Carolina was not a notice given in a manner reasonably calculated to notify Augustin of the pending forfeiture of the property in order to afford him the opportunity to object to the State's taking. No notice provided equals no due process. Without this essential element and notice, the forfeiture proceeding is not a contested case and neither is the resulting decision

final. Augustin points out that the judicial review that the Court of Appeals determined he was to have followed (Title 4-State Government, Chapter 5-Uniform Administrative Procedures Act, Part 3-Contested Cases, 4-5-322-Judicial Review) clearly and exclusively applies only to contested cases. Simply put, judicial review is only for contested cases and Augustin's forfeiture was not a contested case. The forfeiture orders were derived without due process and notice and, thus, cannot be the final decision of a contested case to then trigger the sixty-day time period to file a judicial review. Any other position is contrary to statute and, ultimately, unconstitutional.

In denying relief the Court of Appeals found itself in two uncomfortable positions: The first position requiring Augustin to have filed a claim with the Department of Safety within thirty days of the November 2015 receipt of the forfeiture documents in federal court would be ridiculous since the claim would be requesting a hearing for property already forfeited illegally over 5 years prior. Simply put, there was no property left to have a hearing for. The second position requiring Augustin to have filed a judicial review with the chancery court within sixty days of the November 2015 receipt of the forfeiture documents in federal court is just as absurd since the forfeiture was not a contested case and thus does not meet the standard that merits a judicial review. The Court of Appeals went with the latter and clearly contradicted the statute, § 4-5-322, the Opinion relied upon. See Appendix F.

This Court should grant this petition as this issue affects every State in the Nation. That is, whether a State can confiscate a defendant's property without procedures, never provide notice or any forfeiture documents even when requested, and forfeit it without fair-due process-notice. And if, somehow, the defendant obtains forfeiture documents through another sovereign (take for example, the United States through the filing of a Freedom of Information), could that State claim the receipt of those documents from the United States as its own service of those documents.

This Court must not allow such a State to usurp this position and use it to deny the vacatur of the forfeiture nor allow it to deny the due process that the Due Process Clause required it to have provided. Modern civil forfeiture statutes have become corrupt and unbearable on this Nation and its citizens. And these abuses call out to this Court to exercise its supervisory powers to cease the pillaging of private property by law enforcement under color of law.

Next, we will examine exactly how unbearable modern civil forfeiture have become.

## II. WHETHER MODERN CIVIL-FORFEITURE STATUTES CAN BE SQUARED WITH THE DUE PROCESS CLAUSE AND OUR NATION'S HISTORY?

### A. Preservation of the issue

Augustin raised this issue in two motions filed on June 1, 2021 (T.R. II, 237) and June 7, 2021 (T.R. II, 256) in the chancery court. It was argued the forfeiture statutes are unconstitutional or unconstitutional as they applied to this case. The chancery court never addressed nor ruled on the claim. This claim was raised as Claims 7 & 8 on appeal. And this was also preserved in the permission to appeal to the State Supreme Court. This issue was raised and preserved at every stage.

### B. Reasons for granting the petition

As an initial note, pursuant to T.C.A. § 53-11-451(b), property "may be seized [by law enforcement] upon process issued by any circuit or criminal court having jurisdiction over the property," or

> Seizure without due process may be made if: (1) the seizure is incident to an arrest or a search warrant ...; (2) the property ... has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding ...; (3) [law enforcement] ... has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or (4) [law enforcement] ... has probable cause to believe that the property was used or is intended to be used in violation of [the Drug Control Act].

T.C.A. § 53-11-451(b)(1), (2), (3), & (4). See Appendix Q.

The authority of law enforcement to seize a citizen's property based on probable

cause that the property was used or is intended to be used in violation of the Drug Control Act has been the most problematic, controversial, and abused. Usually, this probable cause is corroborated by a criminal court and/or the same criminal court exercising jurisdiction over the criminal prosecution and filed charges. Augustin was never charged with any criminal charges nor was he provided the opportunity to challenge this probable cause.

This Court and the Tennessee Supreme Court have both clarified that forfeiture actions are in rem, regarding the property; while they proceed parallel to criminal prosecutions and are "based upon the same underlying events," they are civil in nature. United States v. Ursery, 518 U.S. 267, 274 (1996); Stuart v. Tenn. Dep't of Safety, 963 S.W.2d 28, 34 (Tenn. 1998). But the Tennessee Supreme Court has had to acknowledge:

> Recently, critics of civil forfeiture have suggested that law enforcement has in some instances abused civil forfeitures and have emphasized that forfeiture can occur even where there is no conviction for the underlying offense. ... Tennessee courts have noted that, under Tennessee's statutes, forfeiture can occur even where the underlying criminal charges are dismissed. See, e.g., Watson v. Tenn. Dep't of Safety, 361 S.W.3d 549, 557 (Tenn. Ct. App. 2011); Hargrove v. State Dep't of Safety, No. M2004-00410-COA-R3-CV, 2005 WL 2240970, at *2 (Tenn. Ct. App. Sept. 15, 2005).

Sprunger, 458 S.W.3d at 493.

The court's language of "no conviction for the underlying offense," especially, "where the underlying criminal charges are dismissed" imply the understanding that the defendant would also be charged with criminal charges pursuant to the seizure of property. In order for criminal charges to be dismissed, they must have first been filed. And the criminal charges are to be for the "underlying offense" constituting the property seizure.

It is also the understanding of the court's language that the seizure of property "proceed parallel to criminal prosecutions and are based upon the same underlying events," while being civil in nature. Therein, this finding of probable cause for the criminal arrest and prosecution is simultaneously that also for the seizure of

property. The two events--one criminal and the other civil--are inextricably intertwined, "proceed parallel" and form "an underlying offense." Although they proceed parallel, the dismissal of one is nugatory on the other. However, there must be the existence of some probable cause that is usually manifested in a criminal arrest or prosecution. For example, narcotics found in the possession of a defendant is an "underlying offense."

This presents a conundrum: Can officers seize a citizen's private property for narcotics violations without having the probable cause (i.e., evidence of narcotics violations) to initiate a criminal arrest and prosecution for narcotics violations? In such an event, the forfeiture proceeding would not be parallel to the criminal prosecution and based upon the same underlying events (or offense) as this Court originally intended.

1. No arrest for narcotics violations is incompatible with property seizure for narcotics violations.

The policy that one's property can be seized for narcotics violations, even though one is not arrested for narcotics, is ripe for abuse and needs to be overturned. It is law enforcement's authority and understanding that they do not need a conviction for an offense (before pursuing forfeiture) that would incite them to pursue forfeiture even in cases where the defendant was not even criminally charged with an offense giving rise to forfeiture.

It is Augustin's position that the forfeiture statutes create an open window for officers to abuse them. The forfeiture laws allow forfeiture to proceed even when the criminal violation (that gave rise to the property seizure) has been dismissed. At least in those cases it can be said there was an initial determination that some inkling of probable cause existed and it was enough to result in initiating a criminal arrest and prosecution.

But in Augustin's case, where there was no criminal arrest for narcotics violations

because there was no narcotics found, but the property was seized for narcotics violations, this created the opportunity for abuse. Take for example, the different seizure notices issued by the seizing officers during the two arrests for non-narcotics offenses with the seizures occurring for narcotics violations. The December 3, 2009, Notice of Seizure for the $4,943 cash stated the Drug/Substance to be "Cocaine/Marijuana." While the notices for the BMW vehicle (T.R. I, 103) and $847 cash (T.R. I, 107)---also seized on the same day---stated only "Cocaine." And the amount of drugs also differed. All December 3, 2009, cash seizures stated the amount of "Cocaine" was "4 ounces" (T.R. I, 103 & 107), but the $4,943 cash notice added a "1 ounce" of "Marijuana" and the $9,850 cash notice disagreed stating it was instead a "1/2 ounce" of "Marijuana." The BMW vehicle notice stated the amount of Cocaine was "8 ounces" (T.R. I, 103). And the affidavit used to apply for the forfeiture warrants stated the Cocaine was "a 1/4 kilogram of Cocaine," i.e., 9 ounces (T.R. I, 110). The cocaine more than doubled.

Apparently, each seizing officer had the authority to choose his own (combination of) drug(s) and amount as the reason for the seizure. There never was a "1/2" or an "1 ounce" of Marijuana found anywhere or at any time throughout this case. The entire affidavit facts are manufactured and false. None of this allegation of narcotics violation was ever independently corroborated.

It is usually acceptable if evidence of narcotics violations exist to justify the existence of an arrest warrant or an arrest by law enforcement, then seizure of property may follow. The evidence to an arrest and/or the arrest itself corroborate the existence of probable cause for the narcotics violations. However, when no evidence exist for narcotics violations and no arrest or search warrant would be issued due to the absence of probable cause, can an officer simply seize property in the name of narcotics violations that no probable cause exist for? Augustin asserts it is the unconstitutionality of the forfeiture statutes that can allow the BCSO to find no drugs

during his two arrests for non-drug charges and yet seize all his property for (fabricated) drugs and amounts never recovered.

It is Augustin's position that a lack of probable cause to initiate an arrest should also serve as a bar to initiate seizures and forfeiture of property. Simply put, the lack of an arrest and filing of drug charges should also prevent seizures of property for drug violations. If not, then corrupt officers can simply target high-priced, luxury vehicle (or the usual opposite) for traffic stops (e.g., speeding or any other non-narcotics violations) and simply seize valuable or coveted property found during their search for drugs.

Remarkably, this Court has already commented on this very issue. Faced with the many well-documented abuses of forfeiture, Supreme Justice Clarence Thomas stated:

> Civil proceedings often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof. Partially as a result of this distinct legal regime, civil forfeiture has in recent decades become widespread and highly profitable. See, e.g., Institute for Justice, D. Carpenter, L. Knepper, A. Erickson & J. McDonald, Policing for Profit: The Abuse of Civil Forfeiture 10 (2d ed. Nov. 2015) (Department of Justice Assets Forfeiture Fund took in $4.5 billion in 2014 alone) ... And because the law enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture. Id., at 14 (noting that the Federal Government and many states permit 100 percent of forfeiture proceeds to flow directly to law enforcement), see also App. to Pet. Cert. B-2 (directing that the money in this case be divided between the "Cleveland Police Dept." and the "Liberty County District Attorney's Office.").
>
> This system where police can seize property with limited judicial oversight and retain it for their own use has led to egregious and well-chronicled abuses. According to one nationally publicized report, for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights. Stillman, Taken, The New Yorker, Aug. 12 & 19, 2013, pp. 54-56. In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. Id., at 49. In another, they seized a black plant worker's car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to sign away his property, and then released him on the side of the road without a phone or money. Id., at 51. He was forced to walk to a Wal-Mart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up. Ibid.
>
> These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Id., at 53-54; Sallah, O'Harrow, & Rich, Stop and Seize, Washington Post, Sept. 7, 2014, pp. A1, A10. Perversely,

> these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.

Williams v. United States, No. 16-122, 197 L. Ed. 2d 474, 475-76 (2017).

Supreme Justice Thomas in a rare occurrence published an opinion castigating how some of the forfeiture statutes throughout the nation created the inducement for abuse, and stated the sole reason why certiorari to this Court had been denied was because petitioner raised the claim for the first time in the writ application. The question presented was: Whether modern civil-forfeiture statutes can be squared with the Due Process Clause and our Nation's history. Had petitioner raised this issue in the lower courts, the action (Lisa Olivia Leonard v. Texas, No. 16-122, 2017 U.S. LEXIS 1573, 197 L. Ed. 2d 474 (2017)) would have been granted certiorari and based on the numerous documented abuses that the states' forfeiture statutes create, it's doubtful this Court would have found them constitutional. Faced with the many publicized reports throughout the nation of local law enforcement abusing forfeiture statutes (as Legal Plunder), even though certiorari was denied, Supreme Justice Thomas still felt compelled to document these abuses and express the Court's skepticism in the constitutionality of these statutes by stating:

> I am skeptical that this historical practice is capable of sustaining as a constitutional matter, the contours of modern practice, for two reasons.

Id. at 476.

"First, historical forfeiture laws were narrower in most respects than modern ones" and "were limited to a few specific subject matters, such as customs and piracy." Id. at 476-77. "Secondly, it is unclear whether courts historically permitted forfeiture actions to proceed civilly in all respects." Id. at 477.

> Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections, including the right to a jury trial and the proper standard of proof. Indeed, as relevant in this case, there is some evidence that the government was historically required to prove its case beyond a reasonable doubt.

Id.

In the end, Supreme Justice Thomas concluded:

> Unfortunately, petitioner raised her due process arguments for the first time in this Court. As a result, the Texas Court of Appeals lacked the opportunity to address them in the first instance. I therefore concur in the denial of certiorari. Whether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail.

Id.

And examining this State's forfeiture statutes with the many abuses they have created, by allowing forfeiture to proceed when the defendant was found not guilty and when the underlying offense was dismissed or where no criminal charges were ever even filed, it is highly doubtful Tennessee's forfeiture statutes can pass the constitutional muster since they have become a legal plunder for local law enforcement (especially the BCSO reported to be the highest property seizing and forfeiting county in the State). One has to wonder, how many of these forfeitures were administrative forfeitures due to no claim being filed by the defendant because the claimant was incarcerated by the BCSO and the forfeiture warrants were sent to the defendant's home address where he would not receive notice, and thus never file a claim?

Frederic Bastiat, a French economist, statesman and author, wrote and defined "Legal Plunder," during the years of the Second French Revolution of 1848, in his classic book, The Law:

> But how is this legal plunder to be identified. Quite simply: See if the law takes from some person what belongs to them, and gives it to persons it does not belong. See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime. Then abolish the law without delay. If such a law, which is an isolated case, is not abolished immediately, it will spread, multiply and develop into a system.

2. Lack of requirement for Department of Safety to check the seizing agency's jail before service is attempted anywhere else and the lack of requirement to identify the incarceration status of property owner contribute to abuse.

Another prejudice the unconstitutionality of the forfeiture statutes created was the lack of requirement for the Department of Safety to identify the incarceration

status of the property owner first in the seizing agency's jail before mailing the forfeiture warrants anywhere else for service.

Augustin was in the BCSO's custody since his federal arrest on December 9, 2009, whence it was known he was pending federal trial. Yet, six days later, when the first forfeiture warrants for all cash seized were sought (K0986, K0988, & K0992) on December 15, 2009, the seizing officers never changed Augustin's North Carolina address on the seizure notices to reflect his then true address at the BCJC in Cleveland, Tennessee, in the very building comprising the BCSO and criminal court issuing the forfeiture warrants, so he could receive service at the jail. The seizing officers knew forfeiture documents sent to the addresses on the notices (including the fake one written by Det. Smith on the $9,850 seizure notice) would never be served on Augustin in Winston-Salem, North Carolina, since they were housing him in Cleveland, Tennessee.

The reason this occurred, one could point out, was because there was no law requiring the incarceration status of the property owner to be disclosed on the seizure notice. The reality is this: A good portion of defendants who have their property seized for narcotics violations are also arrested and incarcerated by the seizing officer. And since we all know the poor is the favorite and most likely target and suspects of narcotics violations and property seizures by police, the chances of these defendants posting bail are minimal. Usually, the defendants are still in the very custody of the seizing agency by the time the forfeiture warrants are issued and forwarded to the Department of Safety for service. So, why not require the seizing officer who's arresting the defendant and seizing his property to disclose the defendant's arrest and incarceration status on the seizure notice that will be forwarded to the Department of Safety for service.

And even if that defendant later makes bail, the other address on the defendant's ID or driver's license could then be used for service. Or defendants who's property

is seized and posting bond could be asked before their release out of jail for an address to send the forfeiture warrants to for service. The absence of such a requirement is one of the root cause of the forfeiture statutes' unconstitutionality for they induce the abuse where seizing officers can knowingly and intentionally write a defendant's home address on the seizure notice for service while knowing the defendant will still be incarcerated by the time service is attempted. This is unconstitutional. The seizing officer should be required to declare whether the defendant is incarcerated and give that address first for service. And the Department of Safety should also be required to rule out the defendant's incarceration in the seizing agency's jail first before mailing the forfeiture documents to any other address for service.

3. Lack of relief for still-missing U-Haul contents

Another root cause of unconstitutionality of the forfeiture statutes is the grey area created for seizing officers, like BCSO Det. Carl Maskew, who seized property for narcotics violations but then never applied for a forfeiture warrant for said property and never returned the property. Det. Maskew seized the U-Haul's contents on December 9, 2009, without probable cause (in violation of § 53-11-451(b)), never provided Augustin a seizure notice (in violation of § 40-33-203), failed to apply for a forfeiture warrant (in violation of § 40-33-204(b) and (c)(2)), and failed to "return the property to the owner" as required (in violation of § 40-33-204(h)). The forfeiture statutes allow the BCSO to still keep the property only if "needed for evidence in a criminal proceeding," however, if this is not applicable or no longer needed, "the seizing agency shall return immediately the property to the owner." Tenn. Code Ann. § 40-33-204(h).

Evidently, it is the issuance of the forfeiture warrant by a judge that removes the authority of the seizing agency (the BCSO) over the property and transfers it to the Department of Safety. T.C.A. § 40-33-204(g). Therefore, if no forfeiture

warrant is issued, then the Department exercises no authority over the property. Subsection (h). If, as in this case, the BCSO violates all the seizure/confiscation provisions and doesn't return the property, what recourse is available for the defendant to seek the return of property? Section 40-33-213, a judicial review, is for the seeking of relief from "the decision of the applicable agency," i.e., the Department of Safety. Not applicable to the U-Haul contents. Section 40-33-215 does reward damages "if the seizing officer acted in bad faith in seizing or failing to return the property seized," but that's only if the defendant first "prevails in an action against a seizing agency." T.C.A § 40-33-215(a) and (b).

The "prevails in action against the seizing agency" is referring to a judicial review. This creates a grey area. Only if one prevails in a judicial review can one seek damages pursuant to § 40-33-215. If the property was never the subject of a forfeiture warrant to be forwarded to the Department of Safety, then a judicial review (that's only for the Department's decisions) is unavailable. And such an unavailability also disqualifies relief under § 40-33-215. What proper recourse is available for the defendant in Augustin's case?

For example, the circuit judge of the BCSO case on remand agreed that Augustin's constitutional rights were violated throughout the forfeiture, especially regarding the missing U-Haul contents, but he required Augustin to first prevail in the judicial review before giving him relief for his missing property. But his judicial review would only be for the cash and vehicle. And only if Augustin prevails in this judicial review can he obtain relief for the missing U-Haul contents. About a week after the State Supreme Court denied the application for permission to appeal in this case, the BCSO case for relief for the still-missing U-Haul contents (currently on its second appeal) was denied by the court of appeals due to the failure to prevail in the judicial review. Now, Augustin has no relief available for his missing U-Haul contents. To tie the relief of the contents to the success of the vacatur of the

forfeiture of his cash and vehicle is truly unconstitutional. The forfeiture statutes do not provide relief for a defendant such as Augustin who's property is seized, never forfeited, and never returned.

4. **Forfeiture of property violated United States ancillary jurisdiction over the property.**

The U.S. Court of Appeals for the Tenth Circuit has defined ancillary jurisdiction:

> District courts have jurisdiction to enter orders ancillary to a criminal proceeding concerning disposition of material seized in connection with the criminal investigation of a case. United States v. Wingfield, 822 F.2d 1466, 1470 (10th Cir. 1987). Ancillary jurisdiction derives from the notion that a federal court acquires jurisdiction of a case or controversy in its entirety. Jenkins v. Weinshienk, 670 F.2d 915, 918 (10th Cir. 1982). The United States government acknowledges that this case began as a federal prosecution and that the defendant's motion concerns property seized in connection with the criminal proceeding. The Tenth Circuit has ruled that in such circumstances "the district court does have jurisdiction to enter an order concerning the disposition of seized property in its control." Wingfield, 822 F.2d at 1470.

United States v. Fabela-Garcia, 753 F.Supp. 326, 327-28 (D. Utah 1989).

> Other courts have held that in such circumstances a district court "has both the jurisdiction and the duty to ensure the return of such property." United States v. Wright, 197 U.S. App. D.C. 411, 610 F.2d 930 (D.C. Cir. 1979), citing United States v. Wilson, 176 U.S. App. D.C. 321, 540 F.2d 1100 (D.C. 1976); United States v. Premises Known as 608 Taylor Avenue, 584 F.2d 1297 (3d Cir. 1978); United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977), cert denied, 435 U.S. 971, 98 S. Ct. 1611, 56 L. Ed. 2d 62 (1978).

Id. at 328 n. 7.

Augustin asserts that all property was 'seized in connection with the criminal investigation' of the kidnaping, whether on December 3, 2009, when the property was seized during his arrest for state kidnaping, or on December 9, 2009, when the property was seized during his arrest for federal kidnaping. Moreover, the inclusion of the photograph of the BMW vehicle, seizure notices of the cash, and property inventory receipt documentation of the U-Haul rental truck, in his federal discovery from the U.S. Attorney's Office are the requirements of "books, papers, documents, photographs, tangible objects, building or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the

preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Fed. R. Crim. P. 16(a)(1)(C).

At Augustin's federal trial, BCSO Detective David Shoemaker testified that approximately four days after Augustin's December 3, 2009, arrest:

> Chattanooga P.D. came back to me and asked that if I could write a search warrant for the BMW, since it was still parked at our forensics bay. And I did that.

Trial Tr. P. 399 L. 17-20.

The search warrant was issued on December 7, 2009, at 2:23 pm. A copy of this search warrant and photograph of the BMW vehicle were included in the federal discovery. The first thing one should notice about the affiant's trial testimony is that it contradicts BCSO Detective Heath Arthur's date of the BMW's seizure being December 14, 2009.

Also during Augustin's trial and the Government's closing argument, Assistant United States Attorney Christopher Poole stated:

> Does a simple drug user spend $4,000 on drugs; get caught and arrested by the police the next day with another, combined between the two of them, almost $20,000; then make bond of $140,000, and get caught with $18,000 two days later?

Trial Tr. P. 548 L. 4-8.

The cash vouched for was illegally forfeited months before trial. The BMW, central to the kidnaping, was illegally forfeited months after trial, when the Department performed the mailing of forfeiture documents to another state ruse.

The U.S. Court of Appeals for the Sixth Circuit was asked to rule on a case in conjunction with the Fabela-Garcia decision. In denying Lee relief, the Court said:

> The difference between the type and degree of state involvement in this case and Fabela-Garcia counsel against a finding of constructive possession, even if Fabela-Garcia is good law. Here, Ohio did not acquiesce to federal government jurisdiction, as did the state authorities in Fabela-Garcia, thus relinquishing to the United States full control of the case. Ohio not only initiated criminal and civil proceedings against Lee before the United States, but it never abandoned them, convicting Lee and forfeiting his property two weeks before the start of his trial on federal charges.

United States v. Lee, 1995 U.S. App. LEXIS 22542, at *9 (6th Cir. 1995).

The Court continued:

> Additionally, the seized property in Fabela-Garcia could be used in but one criminal prosecution, so that once a federal indictment was issued, the state had no reason to keep the property--it then became a mere custodian for the United States.

Id.

Although the Sixth Circuit denied Lee relief, in the process, it instituted the 3 elements to determine which government had constructive possession of the property. First, is whether the state acquiesced to the Federal Government jurisdiction, 'thus relinquishing to the United States full control of the case.' Second, is whether the state 'initiated criminal' proceedings against the defendant, 'convicting' him of the charged offense, thus, 'never abandoned them,' and initiated 'civil proceedings' to forfeit the property. And, third, since the property 'could be used in but one criminal prosecution,' once a federal indictment was issued, the state had no reason to keep the property and, therefore, 'became a mere custodian for the United States.' Here, in instant case, all three elements were met: First, Tennessee acquiesced to the federal government jurisdiction of the criminal case, thus, relinquishing to the United States full control of the case and its evidence. Secondly, Tennessee dismissed and abandoned all criminal charges against Augustin on December 11, 2009 (exactly 8 days after arresting him), thus never convicting him of any drug or other offense. And, third, since the property could be used in but one criminal prosecution, once a federal indictment was issued on December 22, 2009 (11 days after Tennessee dismissed all charges), Tennessee had no reason to keep the property and became a mere custodian for the United States. Pursuant to federal law, the United States was in constructive possession of the property and Tennessee usurped the United States jurisdiction and violated Augustin's due process by forfeiting the property it was a custodian of.

In a move exuding pure corruption and greed, when Tennessee acquiesced jurisdiction of the case to the United States, Tennessee transferred all criminal evidence (including

firearms and ammunition seized on the same day as the BMW and cash) to the United States to facilitate Augustion's conviction. However, the BCSO kept all valuables (cash, vehicle, personal property) even though they were similarly seized on the same day and during the criminal investigation and were evidence in the federal prosecution. Federal law states that when Tennessee acquiesced jurisdiction of the case to the United States, it also relinquished its jurisdiction over all property seized during the criminal investigation.

It is to the United States that Tennessee acquiesced jurisdiction of the kidnaping case, that prosecuted and convicted Augustin, and it is to the United States that Augustin was to be requesting the return of his property. While in the role of the custodian for the United States and Augustin's property, Tennessee illegally forfeited all the property without providing any notice. The current forfeiture statutes that facilitate this misconduct violate the United States ancillary jurisdiction over the property and the Due Process Clause.

## VII. CONCLUSION

In totality, the forfeiture of property in this case did not comport with due process and was unconstitutional as no notice was ever provided. The United States cannot provide notice for another sovereign. Neither the United States' or Tennessee's forfeiture statutes authorize one another to provide service-for the other-that comports with due process to trigger the time to file a claim. And even if the United States could provide such notice, it occurred after the expiration of the five-year statute of limitations. Furthermore, due to the lack of fair-due process-notice, an opportunity for a hearing, this case does not qualify as a contested case to warrant a judicial review. Moden civil-Tennessee-forfeiture statutes cannot be squared with the Due Process Clause and our Nation's history.

## VIII. RELIEF REQUESTED

Augustin begs this Court to grant the writ, vacate and reverse the judgment of the State Court, find the forfeiture unconstitutional, and that modern civil-forfeiture statutes cannot be squared with the Due Process Clause.

Dated this 3rd day of December 2022.

Respectfully Submitted,