# *Culley v. Marshall:* The Right to a Post-Seizure Hearing

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## I. Introduction

The Supreme Court has granted *cert.* to resolve an issue that could have an enormous impact on how federal law enforcement agencies process the seizure of assets for civil forfeiture.

- The question is whether – and to what extent – a property owner has a due process right to an immediate probable cause hearing following the seizure of his property for civil forfeiture

This issue has been percolating for decades, but the Court is now determined to resolve it in a case called *Culley v. Marshall* that will be argued on October 30.

Obviously, if we had to hold an immediate probable cause hearing every time we seized property for forfeiture,

- Whether with or without a warrant
- Whether it was a federal seizure or an adoption from the state and locals
- It would place a huge administrative burden on the seizing agencies, the US Attorneys and the courts

So, this is an important issue that we need to be following, even though we don't have any idea how it will turn out once the Court rules

I am going break it down in to several parts:

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1. What is the current state of the law in federal forfeiture cases: when is a post-seizure hearing required and when it is not?

2. What are the arguments for changing the law to require a post-deprivation hearing? How have lower courts ruled on that issue?

3. What were the facts in *Culley v. Marshall* and its companion case, *Sutton v. Leesburg*?

4. What the Government has argued in its brief? and

5. Speculation on possible outcomes

**II. Current Law**

In general, there is presently no right to an immediate post-deprivation probable cause hearing when property is seized for forfeiture under federal law

The vehicle for challenging an allegedly illegal seizure is Rule 41(g), F.R.Crim.P.

— But that only applies when the property owner lacks an adequate remedy at law

— And if there is a pending forfeiture proceeding – administrative, civil, or criminal – the property owner has an adequate remedy at law

— He can file a claim in the forfeiture proceeding and

— can either move to suppress the use of the illegally seized property as evidence

— Or he can oppose the forfeiture on the merits

— Thus, subject to some exceptions, it is well-established that once the Government has commenced a forfeiture proceeding, the property owner cannot use Rule 41(g) to challenge the seizure in a pre-trial probable cause hearing

- *United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004) ("The proper office of a Rule 41(g) motion is, before any forfeiture proceedings have been initiated, or before any criminal charges have been filed, to seek the return of property seized without probable cause, or property held an unreasonable length of time without the

institution of proceedings that would justify the seizure and retention of the property.");

- *Rodriguez v. United States Department of Justice*, 4 Fed. Appx. 104, 106-07 (2d Cir. 2001) (once a forfeiture proceeding is commenced, the claimant has no opportunity or occasion to contest the illegal seizure of his property—other than by filing a motion to suppress evidence—claimant's remedy is to contest the forfeiture action itself on the merits);

- *United States v. One 1974 Learjet*, 191 F.3d 668, 673 (6th Cir. 1999) (once the Government serves notice of a forfeiture action on the claimant, the claimant's only remedy is to contest the forfeiture on the merits; he may not file a Rule 41(e) motion);

- *Ibarra v. United States*, 120 F.3d 472, 475-76 (4th Cir. 1997) (once the Government initiates administrative forfeiture proceedings, the district court lacks subject matter jurisdiction over an action commenced against the Government for the return of property based on a violation of claimant's constitutional rights); *In re Seizure of $82,000\ More or Less*, 119 F. Supp. 2d 1013, 1017 (W.D. Mo. 2000) (same);

- *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 479 (2d Cir. 1992) (the district court loses subject matter jurisdiction to adjudicate claims regarding the seizure once the Government commences administrative proceedings);

Now, that's the rule that applies once a forfeiture proceeding has been commenced

— Before CAFRA – *i.e.,* in the 1980s and 1990s – claimants often complained that the Government was dragging its feet in commencing forfeiture actions

— And they would use the threat of filing a Rule 41(g) motion for a probable cause hearing as a way to prompt the Government to move things along

- *In the Matter of the Seizure of One White Jeep Cherokee*, 991 F. Supp. 1077, 1083 (S.D. Iowa 1998) (court exercises anomalous jurisdiction because seizure has effectively shut down claimant's business and delay in instituting civil forfeiture action leaves claimant no remedy at law);

— Typically, when the claimant filed his motion, the district court would set a deadline for the Government to commence a forfeiture proceedings, and would then dismiss the claimant's motion once the Government complied

- *In re: FBI Seizure of Cash and Other Property From Edwin W. Edwards*, 970 F. Supp. 557, 560 (E.D. La. 1997) (where the claimant files a Rule 41(e) motion between the time of the seizure and the Government's filing of a forfeiture

complaint, the motion will be stayed for 60 days to give the Government an opportunity to file);

But CAFRA, changed that

- There is now at 60 or 90 day deadline for commencing an administrative forfeiture proceeding, and a 90-day deadline for commencing a judicial forfeiture action if someone files a claim

- Moreover, a claimant who says that the seizure is causing him a hardship can file a hardship petition under § 983(f)

- So courts typically tell claimants that the cannot shorten the statutory deadlines be filing Rule 41(g) motions before the Government's time to commence a forfeiture proceeding has expired

  - *United States v. $200,255 in U.S. Currency*, 2006 WL 1687774, *4-6 (M.D. Ga. 2006) (the statute contemplates that the seizing agency have 60 or 90 days to evaluate the case and decide whether to proceed; thus, claimant must wait until the agency commences a forfeiture proceeding by sending notice to file his claim; claim filed before the seizing agency sent notice did not start the 90-day clock);

  - *United States v. $630,750.00 in U.S. Currency*, 2015 WL 8029654, *2 (S.D. Fla. Dec. 7, 2015) (following *$200,255*; claim does not trigger the 90-day deadline if it was filed before DEA sent notice under § 983(a)(1); Congress gave seizing agencies time to decide whether to pursue forfeiture; denying motion to dismiss without prejudice pending determination of when DEA sent notice);

  - *United States v. Bluearm*, 2022 WL 1500632 (D.S.D. May 12, 2022) (claimant may not use Rule 41(g) to shorten the deadline for the Government to commence a forfeiture proceeding under § 983; motion filed before the deadline expired denied);

  - *United States v. Premises of 2nd Amendment Guns, LLC*, 917 F. Supp.2d 1120, 1121-22 (D. Or. 2012) (once the Government commences an administrative forfeiture proceeding, claimant has an adequate remedy at law for both his Fourth Amendment objections and defenses on the merits; if he has an immediate need for the property, he may file a hardship petition; it makes no difference that claimant has filed a claim and the Government has not yet commenced a judicial forfeiture, as Congress has given the Government 90 days to decide how to proceed);

  - *Does 1 et al. v. United States*, 2021 WL 4459662 (C.D. Cal. Sept. 15, 2021) (deferring ruling on Rule 41(g) motion until Government has had the full 90 days under § 983(a)(3) to file its complaint);

So, the only times when a motion for a post-deprivation hearing would be appropriate would be where the Government either misses the statutory deadline,

- or where there is no deadline – *e.g.* when the seizure involves personal property other than cash valued at more than $500,000

    - *Omidi v. United States,* 851 F.3d 859 (9th Cir. 2017) (if the seized property is not eligible for administrative forfeiture and the Government does not commence a forfeiture proceeding, claimant's remedy is to file a Rule 41(g) motion challenging the legality of the seizure or arguing that the delay violates due process; claimant bears the burden of proof);

    - *United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004) (Rule 41(g) motion may be used to recover seized property if the Government fails to commence a forfeiture action for an unreasonable period of time);

    - *In re Seizure of Contains of Aluminum Pallets,* 2017 WL 10581077 (C.D. Cal. Apr. 21, 2017) (where, because of the value of the seized property, administrative forfeiture is not possible, claimants are entitled to file a Rule 41(g) motion; but court stays proceeding to give Government 90 days to commence a judicial forfeiture action);

For a general discussion of this issue, *see Asset Forfeiture Law in the United States* (3d ed. 2022), § 3-8.

***Jones-Farmer* Rule**

There is one significant exception to the rule barring pre-trial probable cause hearings once forfeiture proceedings have been commenced

- It's called the *Jones-Farmer* rule, and it applies when the property owner shows that he is the defendant in a criminal case, and that he needs the property to retain counsel.

- The point is that if the Sixth Amendment right to counsel is implicated, the defendant needs to know if he will be able to use the seized property to retain counsel *now*, not when the trial is over.

- Raising the issue then isn't going to do him any good

So, under the *Jones-Farmer* rule, if the defendant shows that he has no other funds with which to retain counsel, he has a right to a pre-trial probable cause hearing

- And if at the hearing, the Government is not able to establish probable cause, the property must be released

- On the other hand, if the Government does establish probable cause, the property will remain in the Government's possession or under restraint, and the defendant will have to rely on court-appointed counsel

    - *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered);

    - *United States v. Farmer,* 274 F.3d 800, 804-05 (4th Cir. 2001) (following *Jones;* same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case);

    - *United States v. $1,546,076.35 in Bank Funds,* 2022 WL 2284561 (C.D. Cal. Feb. 18, 2022) (there is no general right to test the merits of the Government's case by filing a pre-trial motion for the return of property; so, unless the claimant's Sixth Amendment rights are implicated and the *Jones-Farmer* rule applies, the claimant's options are to file a motion to dismiss the complaint, file a hardship petition, or litigate the case on the merits);

    - *United States v. Various Vehicles, Funds and Real Properties,* 2013 WL 1401888, *2 (D.S.C. Jan. 24, 2013) (claimant had no right to a post-seizure probable cause hearing where he could not satisfy the second *Farmer* requirement which protects the Government from frivolous challenges to forfeiture proceedings);

    - *United States v. Simpson*, 2011 WL 195676, *1 n.3 (N.D. Tex. Jan. 20, 2011) (the *Jones-Farmer* rule applies equally to property seized with a seizure warrant and property restrained with a restraining order; defendant's request for a probable cause hearing in his motion for the release of his seized property denied for failure to satisfy the second *Jones-Farmer* requirement);

    - *United States v. Dupree*, 781 F. Supp. 2d 115, 141-43 (E.D.N.Y.2011) (applying *Jones-Farmer* to defendant's post-seizure challenge to seizure based on § 853(f)); *United States v. Swenson*, 2013 WL 3322632 (D. Idaho July 1, 2013) (same);

But the *Jones-Farmer* rule is the only exception to the rule that there is no due process right to a post-deprivation, pre-trial hearing where a claimant can test the Government's right to retain possession of his property pending trial.

- It is the exception that proves the rule

- If there were a general right to a post-seizure or post-restraint probable cause hearing, there would no need for the *Jones-Farmer* rule in the first place

- Because everyone would be entitled to a hearing all the time, whether his Sixth Amendment right to counsel was implicated or not.

## III. *Krimstock v. Kelly*

So that is the law as it stands today with respect to property seized for forfeiture under federal law

- But not everyone agrees that there shouldn't be an automatic right to a post-deprivation hearing

- And there have been a number of successful constitutional challenges raising a due process right to such a hearing when property is seized for forfeiture under state law.

- In *Krimstock v. Kelly,* the Second Circuit (Sotomayor, J.) held that due process required an immediate post-deprivation hearing when someone's automobile was seized as an instrumentality of a state drunk-driving offense

- People need their cars, the court said, and it may be a long time before the case goes to trial that the person is able to recover it by contesting the forfeiture on the merits

    - *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002);

Similarly, the Seventh Circuit said much the same thing in *Smith v. City of Chicago*, which involved the seizure of a vehicle used in a drug case for forfeiture under state law,

    - *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008) (following *Krimstock*; in light of the time that could elapse between the seizure of property for forfeiture under State law and the filing of such an action, and the hardship that can result from the deprivation of property, due process requires an immediate probable cause hearing after the seizure), *vacated, Alvarez v. Smith*, 558 U.S. 87 (2009);

- And the D.C. Circuit said the same thing in *Simms v. District of Columbia,* where the claimant's vehicle was seized for civil forfeiture under the D.C. Code in connection with a gun violation

- *Simms v. District of Columbia,* 872 F. Supp. 2d 90, 95-97 (D.D.C. 2012) (following *Krimstock*; due process requires that a property owner be given a prompt, post-seizure probable cause hearing when his vehicle is seized for forfeiture and is not being held as evidence of a crime; because local Government delayed for a year in commencing a civil forfeiture action, and because local law did not provide for a pre-trial probable cause hearing, the property owner was entitled to the immediate return of his vehicle pending trial);

So, the question whether there is a due process right to an immediate post-deprivation probable cause hearing – at least when the property has been seized for forfeiture under state law – has been pending for over 20 years.

— Until now, however, it has not been considered by the Supreme Court

— But that doesn't mean that the Court hasn't been interested

— It granted *cert.* in the *Smith* case from the Seventh Circuit in 2009, but ended up dismissing the case as moot

- *Alvarez v. Smith*, 558 U.S. 87 (2009);

— Since then, the Court has apparently been waiting for the right case to come along

**Applying *Krimstock* to federal forfeitures**

Meanwhile, no court has applied the due process analysis in *Krimstock* to require an immediate probable cause hearing in a federal forfeiture case

— There are several reasons for this

*Krimstock* itself recognized that there may be a difference in what due process requires in a state drunk driving case and what it requires in a much more complicated federal case

- *Krimstock v. Kelly*, 306 F.3d at 69 n.33 (noting that balancing factors that weigh in favor of immediate post-seizure hearing in New York drunk driving cases might come out differently when applied to federal cases because the latter involve much more complicated issues);

- *Serrano v. Customs and Border Patrol*, 975 F.3d 488 (5th Cir. 2020) (holding that *Krimstock* "is limited to the specific New York City statute at issue, and declining to apply it to forfeiture of a vehicle under the Customs laws, 19 U.S.C. § 1595a(d));

- Other courts recognize that imposing the right to a post-seizure probable cause hearing on federal law enforcement agencies that make thousands of seizures every year would be an enormous administrative burden

    - *Serrano v. Customs and Border Patrol*, 975 F.3d at 500 (noting that requiring a prompt post-seizure hearing in every case involving a vehicle seizure would place "a significant administrative burden" on the Government);

- Others have noted the difference between requiring a prompt hearing when the property was seized with a warrant versus a warrantless seizure

    - *United States v. Any and All Funds . . . Efans Trading Corp.,* 2015 WL 247391 (S.D.N.Y. Jan. 20, 2015) (denying request for post-seizure probable cause hearing as to property seized with a warrant; just as *Kaley* holds that there is no right to challenge the grand jury's finding of probable cause in a criminal forfeiture case, there is no right to challenge the validity of a magistrate judge's finding of probable cause in a civil forfeiture case);

    - *In re The Premises Known and Described as 100 Sweeneydale Ave*., 2015 WL 3607572 (E.D.N.Y. June 6, 2015) (following *Efans Trading*; just as a defendant cannot challenge a grand jury's probable cause finding under *Kaley*, a claimant has no due process right to a post-seizure hearing to challenge a seizure authorized by a warrant issued by a judicial officer);

    - *In Re Return of Seized Property (Chandler and Bobel),* 270 F.R.D. 576 (S.D. Cal. 2010) (denying motion for a post-seizure probable cause hearing on due process grounds, notwithstanding pending administrative forfeiture proceeding, where a judicial officer found probable cause for the seizure in issuing a warrant);

But the reason most often cited for holding that due process does not require a post-deprivation hearing in a federal case is that CAFRA provides due process protections that state forfeiture laws do not

- Including placing short deadlines for commencing a forfeiture proceeding, the right to file a hardship petition, and the right to assert an innocent owner defense

    - *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp. 2d 56, 72 (E.D.N.Y. 2003) (rejecting notion that *Krimstock* applies to federal forfeiture cases where there are built-in due process protections for property owners such as the innocent owner defense and hardship provision);

    - *In Re: Seizure of Certificate of Deposit*, 2011 WL 744296 (W.D. Okla. Feb. 24, 2011) (claimant's claim that the seizure is causing him a hardship is no reason for the court to exercise equitable jurisdiction under Rule 41(g) because § 983(f) provides an adequate remedy at law);

- *United States v. Douleh*, 220 F.R.D. 391, 396-97 (W.D.N.Y. 2003) (there is no reason to exercise anomalous jurisdiction over a Rule 41(g) motion now that CAFRA has created a procedure for releasing property to avoid a hardship);

- *United States v. 8 Gilcrease Lane*, 587 F. Supp.2d 133, 140 (D.D.C. 2008) (following *Douleh*; § 983(f) governs all requests for the pretrial release of property seized for civil forfeiture);

Given all of those considerations, the courts have – at least until now – held that in federal forfeiture cases, the due process balancing test under *Matthews v. Eldridge* does not require an immediate post-deprivation hearing

— And that due process is satisfied as long as the claimant is given a speedy trial on the forfeiture issues under *Barker v. Wingo,* as applied to civil forfeiture by the Supreme Court in *United States v. $8,850 in U.S. Currency;*

- *United States v. $8,850 in U.S. Currency*, 461 U.S. 555, 565 (1983) (applying the 4-part test from *Barker v. Wingo*, Supreme Court finds that 18-month delay in commencing civil forfeiture action did not violate due process);

- *Serrano v. Customs and Border Patrol,* 975 F.3d 488 (5th Cir. 2020) (*Mathews v. Eldridge* does not require an immediate post-seizure hearing, but the claimant retains the right under *$8,850* and *Barker v. Wingo* to object if a forfeiture complaint is filed after undue delay);

## IV. *Culley v. Marshall*

So, that is where things stood when the Eleventh Circuit weighed in on the issue in two cases called *Culley v. Marshall* and *Sutton v. Leesburg*

— Both of these were state forfeiture cases arising under Alabama law

— In both cases, the claimants asked a federal district court to apply *Krimstock* and hold that due process required the state court to give them an immediate probable cause hearing

— But in both cases the district court held that due process did not require such a hearing, and the Eleventh Circuit affirmed

- *Culley v. Marshall,* 2021 WL 4477900 (S.D. Ala. Sept. 29, 2021) (agreeing with the State of Alabama that the appropriate test of a due process violation is *Barker v. Wingo* as applied to civil forfeiture in *$8850,* but that even under the *Mathews* test, there is no right to a post-seizure, pre-trial probable cause hearing where a claimant has the right to regain possession of her property pending trial by posting

a bond; the requirement to conduct such hearing would place an "undue significant burden" on the State; limiting *Krimstock* to the provisions peculiar to New York law), *cert. granted Culley v. Attorney General of Alabama*, ___ S. Ct. ___, 2023 WL 2959364 (Apr. 17, 2023).

- These are the cases that the Supreme Court has agreed to hear

**Facts**

So, what were the facts in these two cases, and what were the courts' reasons for ruling as they did?

In *Sutton,* local police seized Plaintiff's car when a search incident to a traffic stop revealed that the driver, who had borrowed the car from its owner, was in possession of methamphetamine.

- The State commenced a civil forfeiture action against the car under state law within 14 days of the seizure, and Plaintiff, the owner of the car, asserted an innocent owner defense.

- After 15 months of discovery and litigation, Plaintiff prevailed when the state court granted her motion for summary judgment.

- While the state forfeiture case was pending, however, Plaintiff filed an action in federal court asserting that due process required the State to hold a post-seizure hearing to determine if there was probable cause to support the State's retention of her property

- The court denied the motion, holding that under *Mathews v. Eldridge,* the availability of a judicial forfeiture proceeding at which a property owner may challenge the forfeiture of her property on the merits, "provides all the post-seizure process that is due to protect a person's interest in property," as long as the proceeding is timely.

- And because the State instituted the forfeiture proceeding 14 days after the seizure, she was not denied due process

- Plaintiff appealed, but the Eleventh Circuit affirmed

    - *Sutton v. Leesburg*, 2021 WL 4149784 (N.D. Ala. Sept. 13, 2021) (there is no constitutional right to an immediate post-seizure probable cause hearing when property is seized for forfeiture; rather, the right to contest the forfeiture on the merits in a timely way is all that due process requires, and the timeliness issue is

governed by the speedy trial test in *Barker v. Wingo*), *cert. granted Culley v. Attorney General of Alabama*, ___ S. Ct. ___, 2023 WL 2959364 (Apr. 17, 2023);

In *Culley,* Plaintiff's vehicle was seized for forfeiture under Alabama law when her son was found using it to transport marijuana and drug paraphernalia.

- She filed an action in federal court under 42 U.S.C. § 1983, alleging that the State's retention of her vehicle, pending trial, without affording her a post-seizure probable cause hearing, violated her right to due process.

- the court held that the appropriate test of the right to a post-seizure hearing is the speedy trial test of *Barker v. Wingo,* and that because the State promptly instituted civil forfeiture proceedings, there was no violation of due process under that test.

- Moreover, the court held that Plaintiff still had no right to a post-deprivation hearing even if it were to apply the due process test in *Matthews v. Eldridge,* which turns on the balance between the Government's interests preserving the property, and the property owner's interest in a prompt right to heard when she is deprived of it

- In particular, the court held that "the burden on the State to conduct extra proceedings would present an undue significant burden"

- So, Plaintiff's action was dismissed and the Eleventh Circuit affirmed

So now we have a split in the circuits

- In *Krimstock, Smith* and *Sims,* the Second, Seventh and DC Circuits said that due process requires an immediate probable cause hearing when property is seized for forfeiture under state law

- And in *Sutton* and *Culley,* the Eleventh Circuit says it does not

- That the right to oppose the forfeiture on the merits – assuming the Government commences the action in a timely way – is all that due process requires

This is exactly what the Supreme Court has been waiting for to resolve this issue.

## V. Arguments in *Culley* in the Supreme Court

Notice, that none of these cases

- Neither the ones holding that due process requires a hearing or the Eleventh Circuit cases holding that it does not

- were federal cases

- They all were vehicle seizures arising under state law.

None of them involved a complex federal seizure in an international money laundering case or massive fraud scheme or terrorist financing plot

- But that doesn't mean that what the Supreme Court decides will not affect federal cases going forward

- The issue before the court is not whether there is a right to a post-deprivation hearing *in state civil forfeiture cases;*

- It is whether there is a due process right to such a hearing in *all civil forfeiture cases*

- So, despite all of the case law holding over the last 20 years that the *Krimstock* line of cases do not apply to federal cases, for all the reasons I've mentioned

- what the Court decides could easily spill over into the federal realm

- For that reason, DOJ has filed an *amicus* brief in the Supreme Court

**The Government's *amicus* brief**

The Government's principal argument is that allowing the claimant to oppose the forfeiture on the merits in a timely-filed civil forfeiture proceeding is all that due process requires

- And therefore there is no separate right to a post-deprivation "retention hearing"

The brief makes this argument mostly by emphasizing that the Supreme Court has never required such a hearing in the past, and that its precedents should control

- But recognizing that that might not be a winning argument – it obviously did not persuade Justice Sotomayor when she wrote the *Krimstock* opinion as a Second Circuit judge

- The DOJ brief makes a number of supporting arguments

First, it argues that giving the claimants what they want – an automatic post-deprivation probable cause hearing in every case – would override legislative judgments as to how to conduct forfeiture proceedings

- Congress conducted lengthy hearings when it enacted CAFRA, and crafted a careful compromise that the Court should respect

Second, DOJ says that a post-retention hearing would be unnecessary because current law already provides adequate due process protections

1. There is already the right to file a Rule 41(g) motion if no forfeiture proceeding has been commenced

2. Cases can be fast tracked through the remission and mitigation process

3. Claimants can file hardship petitions in federal cases under § 983(f)

4. CAFRA imposes deadlines

And there are practical considerations:

- An automatic hearing would make no sense when the vast majority of cases are uncontested

- Holding an immediate hearing before notice has been sent to all parties would be impractical – it could lead to serial hearings, or the release of property to the wrong claimant

Finally, Government points out that the scope of the automatic hearing is unclear

- What claimants were requesting in the Alabama cases was not a probable cause hearing on the forfeitability of the property

- That would have done them little good, as it was clear that the vehicles were seized from persons using them to transport drugs

- But what they wanted was a hearing on the *validity of their innocent owner defenses*

The *amicus* brief mentions this only in passing – and I think that was a mistake

- The idea of allowing a challenge based not on the validity of the seizure, but on the merits of an innocent owner defense

- When the Government may not even have known who the owner was when the property was seized and has had no opportunity to conduct discovery

- Makes no sense

If the property owner is entitled to a probable cause hearing regarding her likelihood of success under the innocent owner statute, then why would she not also been entitled to a post-seizure raising other defenses

- Such as lack of venue, the Excessive Fines Clause of the Eighth Amendment, statute of limitations, or the court's jurisdiction?

The law is clear that the Government is not required to plead the negative of any affirmative defenses in its complaint, never mind take that into account at the time of seizure

- *United States v. Real Property... 216 Kenmore Ave.,* 657 F. Supp. 2d 1060, 1066-67 (D. Minn. 2009) (the sufficiency of a complaint is governed by Rule G(2); the Government does not have to negate the claimant's defenses but only has to set forth facts that support a viable case, regardless of what arguments or evidence the claimant might offer at trial);

- *United States v. $200,000 in U.S. Currency,* 2023 WL 4291991, *5 (C.D. Cal. May 25, 2023) ("complaint need not anticipate, and attempt to plead around, potential affirmative defenses;" and court may not find a complaint insufficient just because the claimant urges it to draw alternative inferences from the facts);

- *United States v. Real Property Known as 223 Spring Water Lane,* 2021 WL 144245 (E.D. Ky. Jan. 15, 2021) (claimants' lack of involvement in the crime may go to their innocent owner defense, but affirmative defenses are irrelevant to the sufficiency of the Government's complaint);

- So there is no reason the Government should have to establish the absence of an affirmative defense to defend the validity of a seizure

In noting that the scope of the requested "retention hearing" is unclear, I think the Dept missed the chance to point out that a hearing focused only on the probable cause for the seizure would have done the claimants no good, and the broader hearing they requested would be impractical

Unfortunately, there are several other missed opportunities in the *amicus* brief:

1. It does not discuss the magnitude of the administrative problem that would be created by holding that there is an automatic due process right to a post-deprivation hearing

- I don't know how many vehicles Alabama seizes for civil forfeiture every year, but the FBI makes around 4,000 seizures; the DEA makes around 14,000 seizure, and the Customs people make around 60,000 seizures!

- The other agencies – Homeland Security, IRS, Secret Service, ATF, Fish & Wildlife, etc. – make hundreds if not thousands of seizures for civil forfeiture as well

- Somebody should be telling the Court that requiring a immediate "retention hearing" in everyone one of those cases would pose an impossible administrative burden on the agencies, the US Attorneys, and the courts

2. The brief does not touch on at all is the fact that federal cases are often far more complicated – and involve more serious crimes – then the state cases involving vehicles

- I would have liked to have seen some discussion of how the right to an immediate retention hearing would play out in an international money laundering case involving cryptocurrency, Russian organized crime, and the transfer of property to North Korea in violation of international sanctions

3. The brief does not explain how an immediate probable cause hearing in a civil forfeiture case could be used by the targets or defendants in a related criminal case to get discovery

- The whole point of the *Jones-Farmer* rule was to craft a compromise between the property owner's right to an immediate probable cause hearing with the Government's right to protect an on-going criminal investigation or prosecution

- Any defense attorney representing a target or defendant in a related case would want to request such a hearing not because he believed probable cause for the seizure was lacking

- But to get the Government to reveal its evidence and its witnesses

- And it was precisely to avoid that situation that the courts have held that there is no right to a probable cause hearing *except in the limited circumstance where the person's Sixth Amendment right to counsel is implicated*

    - *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475-76 (5th Cir. 2007) (*en banc*) (restricting the right to a post-restraint hearing only to certain situations would "spare the Government from frivolous challenges that might impede its ongoing criminal investigations, but does so without jeopardizing the rights of property owners to access their assets in a timely fashion when necessary);

    - *United States v. Wijetunge,* 2015 WL 6605570, *5 (E.D. La. Oct 28, 2015) ("[T]he Government has a significant interest in securing the availability of forfeitable assets and in avoiding an unnecessary hearing regarding the basis for seizure of those assets which hearing would at least partially overlap with issues it must prove at trial. Such interest weighs against conducting an evidentiary hearing.");

    - *United States v. Swenson*, 2013 WL 4782134 (D. Idaho Sept. 5, 2013) (the limits imposed by the *Jones-Farmer* rule are needed to prevent the defendant from using the hearing to preview the Government's criminal case);

    - *United States v. Simpson*, 2011 WL 195676, *5-6 (N.D. Tex. Jan. 20, 2011) (*Jones-Farmer* is needed to preserve the Government's legitimate interest in protecting its witnesses and evidence from premature exposure in a criminal case; "the Government should not be required to put on a dress rehearsal performance of part or all of its case-in-chief as the price for protecting its valid interest in preserving assets that are allegedly subject to forfeiture");

    - *Cf. Kaley v. United States,* 571 U.S. 320 (2014) (in support of its holding that the defendant has no right to a judicial redetermination of the grand jury's finding of probable cause when his property is restrained pre-trial, the Court explains that the Government should not have to choose between preserving the property and giving the defendant a "sneak preview" of its case and strategy beyond what the criminal rules or due process requires);

- But this is not mentioned anywhere in the *amicus* brief

## VI. Possible Outcomes

Given the composition of the Court, the Government's position that due process never requires a separate post-deprivation hearing may not prevail

- It is likely that the Court will find that there is a due process right to a post-deprivation hearing in at least some circumstances

- Most likely, it will say as little as possible on the subject, holding that there is such a right in cases with facts like those in *Culley* but leaving it to the lower courts to determine how the balancing test applies in other cases

- there is no reason to think that if the Court finds that there is a due process right to an immediate retention hearing, it would limit that right to state civil forfeiture cases

- but it may well suggest that the balancing factors may produce a different result in particular cases depending on a variety of circumstances including:

    - whether the seizure was with a warrant;

    - whether the forfeiture is contested;

    - whether there is related, ongoing criminal investigation;

    - whether the property owner has other remedies, such as those provided under CAFRA (hardship petition, short deadlines, right to move to suppress, right to move to dismiss the complaint, innocent owner defense);

    - whether the case is complex, involves a serious crime, or involves international issues;

    - whether there are multiple potential claimants; and

    - whether, given the number of seizures that are made and the number of hearings that would be required in a given jurisdiction for a given category of offenses, immediate hearings in all cases would create an undue administrative burden on the courts.

Most important, the Court may say that the scope of the post-seizure hearing is limited to the probable cause to believe that the property is subject to forfeiture,

— but not require a probable cause hearing with respect to the property owner's affirmative defenses.

The case will be argued on October 30, 2023, so we will soon know how it turns out.