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No. 08-351

IN THE

# Supreme Court of the United States

RICHARD A. DEVINE
State's Attorney of Cook County, Illinois,

*Petitioner,*

*v.*

CHERMANE SMITH, EDMANUEL PEREZ,
TYHESHA BRUNSTON, MICHELLE WALDO,
KIRK YUNKER, and TONY WILLIAMS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

# BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether local law enforcement agencies may seize personal property and then retain custody of the property indefinitely, without any judicial or administrative review of the lawfulness of the continued detention of the property?

2. Whether the circuit court imposed a premature "mandatory injunction" when the court remanded the case for additional discovery and directed the district court to fashion a remedy based on the facts that evolved from the discovery process?

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**RULE**

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## STATEMENT OF THE CASE

The Illinois Drug Asset Forfeiture Procedure Act (DAFPA, 725 ILCS 150\1 *et seq.*) allows police departments 52 days following the seizure of property to decide whether to recommend forfeiture of the seized property. 725 ILCS 150\5. During those 52 days, it is the policy and practice of the City of Chicago (City) and Petitioner Devine to refuse to return the seized property. (R. App. 2, 3). Following the City's 52 allotted days, Petitioner Devine and the Cook County State's Attorney's Office (SAO) have an additional 45 days to review the forfeiture recommendation of the Chicago Police Department. 725 ILCS 150\6(A). During those 45 days, it is Devine's policy and practice to refuse to return the seized property upon demand by the owner. (R. App. 2, 3). As a result of this policy and practice, property seized by a Chicago police officer without a warrant may be held for forfeiture by the SAO for 97 days before a forfeiture decision is even made. *Id.*

When Devine decides to seek forfeiture, more delays are inevitable. Notice is mailed to the last known address of the property owner, who then has 45 days to file a written claim and pay a filing fee. 72 ILCS 150/6(c)(1) and 150/9(A). Until an Answer is filed and the fee paid, the property owner cannot have the merits of the case reviewed by a judicial officer. *Id.* When a claim is filed, the forfeiture trial may be continued for 60 days without explanation or cause. *Id.* And "for good cause shown" (725 ILCS 150/9(F)) or when there is a related proceeding in criminal court, the forfeiture trial may be stayed indefinitely. 725 ILCS 150/9(J). As a result of these built-in delays, property owners usually must wait

several months before they can appear in court and contest the continued detention of their property. (R. App. 3, 4).

Three of the Plaintiffs (Smith, Perez, and Brunston) had their cars seized by Chicago police officers acting without warrants but pursuant to the DAFPA. (R. App. 6, 7). None of these Plaintiffs were charged with a criminal offense. (R. App. 6, 7). Each of these Plaintiffs was forced to wait more than a year without a judicial hearing related to the continued detentions of their cars. (R. App. 6, 7). The other Plaintiffs (Yunker, Waldo, and Williams) had cashed seized. (R. App. 6, 7). Their money was held for months without judicial review of the legitimacy of the original seizure or of the continued detention of the money. (R. App. 6, 7).

Plaintiffs filed their Complaint pursuant to 42 U.S.C. § 1983. (R. App. 1). They included a request for class certification, and they sought an injunction that would require the City of Chicago and Devine to hold hearings promptly after the seizure of property. (R. App. 4, 5). These hearings would follow the seizure of the property but precede the actual forfeiture trial. (R. App. 4, 5). Plaintiffs did not seek dismissal of their state forfeiture cases or any other relief that would prevent the forfeiture cases from proceeding.

Before discovery commenced, all of the Defendants moved to dismiss based on *Jones v. Takaki*, 38 F.3d 321, 324, 325 (7th Cir. 1994), which had held that the only process that is due when property is seized for forfeiture is the forfeiture trial itself. Plaintiffs acknowledged that *Jones* was the then controlling precedent and the District Court dismissed the case. (P. App. 1, 3).

The Seventh Circuit overruled *Jones* and held that Plaintiffs were entitled to a hearing promptly after their property was seized. (P. App. 8-11). The case was then remanded to the District Court to "fashion appropriate procedural relief consistent with this opinion." (P. App. 10). Since *Smith* overruled *Jones*, the *Smith* panel circulated its opinion to all active members of the Seventh Circuit, except Judge Rovner, who did not participate. *Id.* None of the thirteen active members of the Seventh Circuit "voted to rehear the matter en banc." (P. App. 11).

## SUMMARY OF THE ARGUMENT

Review by this Court is not warranted because the circuits are not split on the issues decided by the Seventh Circuit, and that court did not issue a premature, mandatory injunction.

Every circuit that has addressed the question has held that when a government agency seizes personal property without a warrant, a prompt post-seizure hearing is required. *See Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002); *Propert v. District of Columbia*, 948 F.2d 1327, 1332-33 (D.C. Cir.1991); *Draper v. Coombs*, 792 F.2d 915, 923 (9th Cir. 1986); *Coleman v. Watt*, 40 F.3d 255,261 (8th Cir. 1994); *Breath v. Cronvich*, 729 F.2d 1006,1011 (5th Cir. 1984) ; *Goichman v. Rhueban Motors Inc.*, 682 F.2d 1320, 1323-24 (9th Cir. 1982); and *De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185 (4th Cir. 1985). In all of these cases, the courts applied the flexible due process methodology that is derived from this Court's decision in *Mathews v. Eldridge*, 419 U.S. 319 (1976). And this Court specifically applied *Mathews*

to forfeiture proceedings in *United States v. James Daniel Good Realty*, 510 U.S. 43 (1983).

In effect, Devine is urging the Court to overturn decades of established precedent applying *Mathews* to circumstances like those presented here. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539, (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Ingraham v. Wright*, 430 U.S. 651 (1977). Devine mistakenly insists the Court should jettison *Mathews* in favor of the very different criteria of *Barker v. Wingo*, 407 U.S. 514 (1972), even though *Barker* is used exclusively in cases where a party demands the extreme and disfavored remedy of dismissal of the charges. *Doggett v. United States*, 505 U.S. 647, 120 L. Ed. 2d 520 (1992); *United States v. Loud Hawk*, 474 U.S. 302, 88 L. Ed. 2d 640 (1986). *Barker* never is applied when the issue is whether an interim hearing - one that follows the seizure of property but precedes the trial on the merits - is required. *See, e.g., City of Los Angeles v. David*, 538 U.S. 715, 716 (2003); *Gilbert v. Homar*, 520 U.S. 924, 932 (1999) - (applying *Mathews* rather than *Barker)*.

In fact, the constitutional harm that is inflicted by Devine does not occur in federal forfeiture proceedings because none of the routinely, available federal remedies is offered by Devine. When a federal agency seizes personal property, the owner has access to a panoply of prompt, post-seizure proceedings that more often than not result in return of the property or remission of some of the loss. Federal claimants can file an equitable action to compel the filing of the forfeiture or return of the seized property. *Slocum v. Mayberry*, 15 U.S. (2 Wheat) 1, 10 (1817). Rule 41(e) of the Federal Rules of Criminal

Procedure also allows property owners to file claims for the return of seized property and 19 U.S.C. § 1618, and 19 C.F.R. § 162.31(a) authorize remission and mitigation petitions. A 10% bond can be posted to secure the release of seized vehicles. 19 U.S.C. §§ 1608 and 1614.

In summary, the Seventh Circuit acted in accordance with this Court's teaching, when it applied *Mathews* and concluded that Devine cannot detain property for months without some form of interim, judicial review.

## REASONS FOR DENYING THE PETITION

### I. When The Police Seize Personal Property Without A Warrant, The Property Owner Is Entitled To A Prompt Post-Seizure Hearing.

#### A. The Circuits Are Not Split On This Issue.

Petitioner Devine's principal contention is that the Court should review this case to correct a split among the circuits. (Pet., at 19-22). No such split exists.

The Second Circuit has specifically addressed the question presented here on three occasions and each time held that a prompt, post-seizure hearing is required. *See Krimstock v. Kelly*, 306 F.3d 40 (2nd Cir. 2002); *Jones v. Kelly*, 378 F.3d 198 (2nd Cir. 2004); *Krimstock v. Kelly*, 464 F.3d 246 (2nd Cir. 2006). The forfeiture scheme at issue in the *Krimstock* cases was substantially the same as the Illinois Drug Asset Forfeiture Procedure Act (DAFPA, 725 ILCS150/5 *et seq.*) that is at issue here. Under the New York

forfeiture act, motor vehicles were seized from "those accused of driving while intoxicated" and in other circumstances "for which a motor vehicle could be considered an instrumentality" of the crime. *Krimstock*, 306 F. 3d at 43. After the seizure, the car remained in the city's possession "in the hope of one day . . . prevailing in civil forfeiture proceedings." *Id.* at 44. The civil forfeiture proceedings in *Krimstock*, like those at issue here, "generally [awaited] the resolution of criminal charges and [took] months or even years to be finalized." *Id.*

The Second Circuit applied *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) to those facts and held that vehicle owners are entitled to prompt, post-seizure hearings. *Krimstock*, 306 F. 3d at 43. In two subsequent cases, the Second Circuit re-affirmed its commitment to *Mathews* as the correct due process standard, whenever the issue is whether a property owner is entitled to a hearing that follows the seizure but precedes the forfeiture trial. *Jones*, 378 F.3d at 202-04; *Krimstock*, 464 F.3d at 252-54.

All of the other circuit courts also consistently hold that when the government seizes a vehicle, the owner of the vehicle is entitled to a hearing within days of the seizure. In *Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994), for instance, the Eighth Circuit held that when a car is seized, a post-deprivation delay of more than seven days without a hearing violates due process. A similar result was reached by the Ninth Circuit in *Goichman v. Rhueban Motors Inc.*, 682 F.2d 1320, 1323-24 (9th Cir. 1982) and in *Stypman v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) - ("A five-day delay in justifying detention of a private vehicle is

too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle"). The Fifth Circuit upheld slightly longer delays, but only because the car owner had the right to post bond and secure the release of the car pending trial. *Breath v. Cronvich*, 729 F.2d 1006, 1011 (5th Cir. 1984); *see also De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185 (4th Cir. 1985); *Propert v. District of Columbia*, 948 F.2d 1327, 1332-33 (D.C. Cir. 1991)

In all of these cases, the courts held that a prompt, post-deprivation hearing was required. Thus, the circuit courts are not split, and there is no reason for this Court to review Plaintiffs' case.

### B. The Seventh Circuit Properly Applied The Mathews Due Process Criteria.

In the preceding Section, Plaintiffs proved that the circuits are not split with respect to the issue presented here. In this Section, Plaintiffs prove that *Mathews* is the time-tested, due process standard for cases involving the right to such hearings. Therefore, the Seventh Circuit was following this Court's lead and there is no reason for further review.

Plaintiffs acknowledge that pre-seizure hearings are not required when the police seize personal property for forfeiture. *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). But when a pre-seizure hearing is not feasible, a prompt post-seizure hearing (one that follows the seizure but precedes the trial) must be held. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 5-6 (1991); *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 261 (1987);

*Federal Deposit Insurance Corp., v. Mallen*, 486 U.S. 230 (1988). The *Mathews* criteria are applied to determine when the hearing must be held and to define the nature and scope of the hearing. *Memphis Light, Gas and Water v. Craft*, 436 U.S. 1, 18-20 (1978); *Heller v. Doe*, 509 U.S. 312, 330 (1993).

*Mathews* requires consideration of a) the personal interest affected by the prolonged detention; b) the risk of an erroneous deprivation; and c) the nature of the government's interest and the cost of holding an interim hearing. *Mathews*, 424 U.S. at 335. Using this methodology, this Court has consistently held that the government must offer some form of post-seizure hearing promptly after personal property is seized. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31(1982).

In *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 606, 42 L. Ed. 2d 751 (1975), for example, the Court struck down a statute that permitted impoundment of property and postponed all review until the trial on the merits. The Georgia statute violated due process because, "[A] bank account . . . . was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt . . . . without notice or opportunity for an early hearing and without participation by a judicial officer." The same due process analysis was applied in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339, 23 L. Ed. 2d 349 (1969), *Barry v. Barachi*, 433 U.S. 55, 64-65, 61 L. Ed. 2d 365 (1979), and *Zinermon v. Burch*, 494 U.S. 113, 128, 108 L. Ed. 2d 100 (1990). The lesson of these due process cases is that when a pre-deprivation hearing is not feasible, a prompt post-seizure hearing is required.

With these well-established principles in mind, the Seventh Circuit relied on *Mathews* and held that property owners have a due process right to a prompt, post-seizure hearing. Because the District Court did not consider the *Mathews* criteria, the Seventh Circuit remanded the case to the District Court to determine what relief *Mathews* might require. In that respect, the Seventh Circuit acted in accordance with all of the other circuits and applied the *Mathews* due process methodology that this Court has routinely applied under similar circumstances.

### C. Mathews Applies To Forfeiture Proceedings.

Devine, nonetheless, maintains that *Mathews* never applies to forfeiture proceedings involving personal property. (Pet. at 27-29). That contention is unquestionably wrong.

In *United States v. James Daniel Good Realty*, 510 U.S. 43 (1993), the Court applied *Mathews* to the seizure of real property and held that owners of real property are entitled to a pre-seizure hearing, even when the police already have a warrant to seize the property. *Good*, 510 U.S. at 51-53. The Government maintained that since it had complied with the Fourth Amendment's Warrant Clause, its conduct was beyond reproach. The Court rejected that argument because no case supported "the proposition that the Fourth Amendment is the beginning and the end of the constitutional inquiry whenever a seizure occurs." *Good*, 510 U.S. at 51. Instead, the Court examined the seizure under the Due Process Clause, applied traditional *Mathews* due process review, and held that, since real property has a permanent location, a pre-seizure hearing is necessary. *Id.*

Plaintiffs acknowledge that, when it comes to personal property, *Mathews* does not require a pre-seizure hearing. *Calero Toledo v. Pearson Yacht Leasing*, 416 U.S. 663 (1974). The police must be allowed latitude to seize personal property without prior notice and without a pre-seizure hearing. *Id.* A rule that mandated pre-seizure hearings for personal property would be unworkable; property owners would use the advance notice to hide or dispose of the personal property. But once personal property is in police custody, the due process analysis is the same as it is for real property. By then, "the reasons that justify dispensing with the magistrate's neutral judgment evaporate." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). At that point, "the State's reasons for taking summary action (decrease) . . . (while the) need for a neutral determination of probable cause increases significantly." *Id.*

In light of *Good*, Devine cannot deny that *Mathews* is applied to forfeiture proceedings so he is forced to maintain that *Good* only applies to real property. According to Devine, real property deserves significantly greater protection than personal property and, therefore, *Good* must be limited to real property. But the difference between real and personal property can be accounted for by *Mathews* without dumping *Mathews* for *Barker v. Wingo*, 407 U.S. 514 (1972), as Devine claims the Court must do. (Pet., at 27, 28). Devine offers no reason for this Court to suddenly change course and overrule decades of cases applying *Mathews*'s pragmatic and flexible approach to issues like the one presented here.

Furthermore, taken to its logical conclusion, Devine's approach would require pre-arrest notice even when a judge had already issued an arrest warrant. *But see Michigan v. DeFillippo*, 443 U.S. 31, 36, 61 L. Ed. 2d 343 (1979); *Atwater v. Lago Vista*, 532 U.S. 318, 354, 149 L. Ed. 2d 549 (2001) - (holding that the police may arrest and detain a suspect without a warrant and without pre-seizure notice to the suspect). The loss of personal liberty that follows an arrest deserves more protection than the property owner in *Good* received because personal liberty is valued more than an interest in real property. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 118 L. Ed. 2d 437 (1992); *Addington v. Texas*, 441 U.S. 418, 424, 433, 60 L. Ed. 2d 323(1979); *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). That being the case, a due process rule that requires notice and a pre-seizure hearing to protect an interest in real property must also require a warrant and a pre-arrest hearing before a liberty interest is extinguished. But that result is contrary to all of this Court's cases dealing with arrests without warrants, so Devine's understanding of *Good*, as limited to real property, is unquestionably wrong. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 235 (1983); *Ornelas v. United States*, 517 U.S. 690, 700 (1996) - (allowing for arrest based on a police officer's assessment of probable cause without a warrant or a pre-arrest hearing).

The police are allowed to arrest without a warrant, without prior notice, and without a pre-arrest hearing. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). In *Good* the police had a warrant from a judge establishing "probable cause to believe the property was subject to forfeiture . . . . " *Good*, 510 U.S. at 47. The warrant alone would

justify an arrest and an extended detention of a person (*County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991), yet no one ever seriously argues for pre-arrest notice. "Due process permits an arrest without a previous warrant because it is dangerous to allow a person . . . to roam at large while awaiting a hearing." *Holly v. Woolfolk*, 415 F.3d 678, 681 (7th Cir. 2005). Devine's contention, therefore, cannot be right. *See United States v. Watson*, 423 U.S. 411, 416-24, 46 L. Ed. 2d 598 (1976); *Illinois v. McArthur*, 531 U.S. 326, 148 L. Ed. 2d 838 (2001) - (allowing for arrests without a warrant, without pre-arrest notice, and without a pre-arrest hearing).

The reason underlying *Good's* pre-seizure notice requirement is not that real property deserves greater protection than personal liberty deserves. Pre-seizure notice is feasible and therefore required with respect to real property because real property has a permanent and fixed location. Pre-arrest notice is not feasible because many suspects would use the advance notice as an opportunity to flee, a concern that obviously does not apply to a house or a lot. But once the suspect is in police custody he, too, is in a fixed location and no longer is a flight risk, so a prompt, post-seizure hearing must be held. *McLaughlin*, 500 U.S. at 57. For the same reasons, Plaintiffs never suggested they were entitled to a pre-seizure hearing. Personal property can be moved, hidden or sold given sufficient advance notice of an impending seizure. However, once personal property is seized and is in police custody, a post-seizure hearing is both feasible and necessary. And that is all the Seventh Circuit held in Plaintiffs' case. (P. App. 8-11).

### D. The Right To Dismissal Of A Forfeiture Action Is Not The Same As The Right To A Prompt Interim Hearing.

Devine, however, cites a series of federal forfeiture cases where the claimant sought dismissal of the forfeiture action rather than an interim hearing. Devine then maintains that those cases prove that the *Barker* speedy trial factors should have been applied to Plaintiffs' due process claim. (Pet., at 22- 26). But the cases cited by Devine involved a very different issue of law and starkly different facts.

Devine insists that *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850)*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986) prove that *Barker* rather than *Mathews* is the applicable due process standard. From that false premise, Devine mistakenly concludes that he may seize personal property and hold it for months without offering some form of prompt, post-seizure judicial review.

Devine's premise is false and his conclusion wrong because *$8,850* and *Von Neumann* presented a very different issue - whether the claimants were entitled to dismissal of forfeiture actions due to pretrial delays. If Plaintiffs were demanding dismissal of their pending state forfeiture charges, *Barker* would control the inquiry. The remedy at issue here, however, is the right to an interim hearing, not dismissal of the charges, so *Mathews* is the appropriate due process standard, just as it was in *Good.*

In *$8,850*, the claimant was indicted on customs and banking charges. The government also initiated a civil forfeiture action. *$8,850*, 461 U.S. at 556-57. Pursuant to applicable federal regulations, the claimant had the right to file a petition for remission or mitigation immediately following the seizure. *$8,850*, 461 U.S. at 557. At that time, remission petitions were filed in 90% of all such cases, and in 75 % of the cases the claimant was granted "at least partial relief." *Id.* at 558. Thus, the claimant in *$8,850* had an available and routinely successful interim remedy, but she wanted far more than a partial remission. She wanted all her money back. *Id.* at 558. The issue, therefore, was whether the delay in filing the judicial forfeiture complaint warranted the extreme remedy of dismissal, even though the claimant had access to interim remedies.

The claimant in *$8,850* admitted the seizure of her money was lawful and that there were grounds to forfeit her money. Her interest was not in a prompt, post-seizure hearing; she wanted the forfeiture case dismissed regardless of the merits of the seizure. *Id.* That being the case, *Barker* rather than *Mathews* applied. Since the delay in filing the forfeiture action was tempered by the availability of the remission procedure and other interim remedies (none of which are allowed by Devine), the claimant in *$8,850* fell far short of proving a *Barker* violation.

In *Von Neumann*, as in *$8,850*, the claimant insisted on outright dismissal of the forfeiture action based on an alleged delay in filing the judicial forfeiture action. The delay in *Von Neumann* was only 36 days and, as in *$8,850*, the claimant in *Von Neumann* was "able to

trigger the rapid filing of a forfeiture action if he desire[d] it." *Von Neumann*, 474 U.S. at 244 n.3. In fact, by posting a bond, the claimant secured the release of his car within two weeks and his remission petition was granted, in part, on the 36th day. He, however, was not satisfied with that interim relief and demanded dismissal of the forfeiture action.

The claimant in *Von Neumann* was not entitled to dismissal for the same reason the claimant in *$8,850* was not entitled to this "unsatisfactorily severe" remedy. In both cases, the claimants had access to prompt, interim remedies and those interim remedies provided substantial relief. *Von Neumann* and *$8,850*, therefore, are limited to cases where the claimant seeks dismissal of the forfeiture action, even though he has access to prompt, and largely successful, interim relief.

The lesson that emerges from *Mathews*, *$8,850* and *Von Neumann* is that the due process analysis changes depending on the nature of the relief sought. When the issue is whether an informal hearing should follow a government seizure but precede the trial on the merits, *Mathews* provides the relevant guideline. On the other hand, when a property owner has access to prompt, interim relief but demands dismissal of the forfeiture charges, the *Barker* speedy trial factors come into play.

*Good* illustrates perfectly the distinction between the type of due process claim raised by Plaintiffs - a request for an intermediate or interim hearing - as contrasted with the requests for dismissal of the forfeiture actions in *$8,850* and *Von Neumann.* The claimant in *Good* could not establish prejudice, an

essential element of any *Barker* inquiry, because he admitted he committed an act that warranted forfeiture of his property. *Good*, 510 U.S. at 46,47. He also had access to interim remedies and the delay in the forfeiture trial was related, at least in part, to his conduct. On those facts, the property owner in *Good* could not prevail under the *Barker* standard. So, if *Barker* were the due process standard, the claimant in *Good* would have lost. He, however, prevailed on his claim because the Court applied *Mathews*, just as the Court always has done when the issue was whether an interim hearing is required.

The distinction between these two remedies, dismissal of charges versus the right to an interim hearing, is analogous to the distinction between the right to a *Gerstein* hearing (*Gerstein v. Pugh*, 420 U.S. 103, 113, 114 (1975)) following an arrest, as opposed to the right to dismissal of the charges. Every person accused of a crime has the right to a *Gerstein* hearing within 48 hours of arrest (*County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991)) but failure to provide the *Gerstein* hearing within that time frame does not entitle the arrestee to dismissal of the charges. *Powell v. Nevada*, 511 U.S. 79, 83 (1994). The interim review afforded by the *Gerstein* hearing exists independent of the right to a speedy trial, and the due process evaluation changes when a party is seeking an interim hearing as distinguished from dismissal of the charges.

The same distinction applies to the other cases cited by Devine. In *United States v. Robinson*, 434 F.3d 357 (5th Cir. 2005) "large sums of cash" were recovered from "a Crown Royal bag" that was found under the driver's

seat of a car the claimant was driving. *Robinson*, 434 F.3d at 359. Although the claimant was under investigation "as part of a multi-party drug" operation, he was not arrested when the money ($188,980.00) was seized. *Id.* An administrative forfeiture action was initiated and a certified letter was sent to the claimant. *Id.* The letter notified him of his right to file a claim as well as his right to interim relief through a remission petition. *Id.* Four more letters were sent in the following weeks and notice was published in New York Times. Meanwhile, the claimant was indicted and ultimately convicted of drug trafficking and money laundering. *Robinson*, 434 F.3d at 360.

The seized cash was administratively forfeited in June, 2000, yet the claimant did not file a motion for return of the property until three years later. *Id.* He was not concerned with interim relief and, in fact, extensive interim relief was available to him shortly after the money was seized. The claimant in *Robinson* had only one goal in mind; he wanted the forfeiture vacated on speedy trial grounds. *Robinson*, therefore, is factually and legally distinguishable from Plaintiffs' case, where the only requested relief is a prompt, interim hearing. When interim remedies are available, as they were in *Robinson*, and the property owner eschews them in favor of the more extreme remedy of dismissal of the forfeiture action, the *Barker* speedy trial analysis applies. But when the owner does not have access to an interim remedy and he is not seeking dismissal of the forfeiture action, *Mathews* applies.

In *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (9th Cir. 2003), an administrative forfeiture action was filed within 120 days of the seizure, but the government waited five years to file a judicial forfeiture action. *Ninety-Three Firearms*, 330 F.3d at 417, 419. The owner filed a motion to dismiss based on the delay in filing the judicial forfeiture action. *Id.* The Ninth Circuit held that the administrative forfeiture action provided an opportunity for the owner to secure prompt, interim relief. The owner also had the right to file for remission promptly after the guns were seized, the right to trigger the filing of a judicial forfeiture proceeding, and the right to recover the guns pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. *Id.* at 424, 425.

The owner ignored all of those readily available interim remedies and then demanded dismissal of the forfeiture action. The issue in *Ninety-Three Firearms*, therefore, was not whether the owner had the right to post-seizure, interim remedies. He had many such remedies but chose to ignore them. Since he was demanding dismissal rather than access to an interim remedy, his claim was subject to review under the *Barker* criteria.

The same is true for *United States v. Turner*, 933 F.2d 240 (4th Cir. 1991), *Nnadi v. Richter*, 976 F.2d 682 (11th Cir. 1992) and *United States v. $47,980 in Canadian Currency*, 804 F.2d 1085 (9th Cir. 1986), the other cases cited by Devine. (Pet., at 19, 34). For example, the delay in *Turner* "was as much attributable to Turner's decision to defer asserting his right to return of the vehicle . . . as to the government." *Turner*, 933 F.2d at 246. In *Nnadi*, "a prompt hearing would have ensued if the

[owner] had filed a claim" and, in any event, an administrative forfeiture was filed with only a "relatively short delay" of "forty days . . ." *Nnadi*, 976 F.2d at 687. The property owners in *Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency* likewise did not avail themselves of their right to expedite judicial forfeiture. As that court noted, "The failure to request immediate judicial proceedings suggest that an early judicial hearing was not desired." *$47,980*, 804 F.2d at 1089. Thus, in all of the cases cited by Devine, the property owners had access to an array of prompt, post-seizure remedies yet the claimants demanded dismissal of the forfeiture actions. Because the claimants were seeking dismissal, rather than access to interim remedies, their cases were subject to review under *Barker* rather than *Mathews*.

**E. The Issue Presented Does Not Arise When The Federal Government Seizes Property For Forfeiture.**

Review also is not warranted because Devine and the City have staked out an idiosyncratic position that is irreconcilable with standard, post-seizure practices throughout the federal system.

Federal forfeiture statutes and regulations include multiple, post-seizure remedies that ameliorate the harm to owners who must wait months for a forfeiture trial. First, a federal claimant "can file an equitable action seeking an order compelling the filing of the forfeiture or return of the seized property." *United States v. Eight Thousand Eight Hundred and Fifty Dollars (8,850)*, 461 U.S. 555, 569 (1983) (citing *Slocum*

*v. Mayberry*, 15 U.S. (2 Wheat) 1, 10, 4 L. Ed. 169 (1817)). Second, in federal forfeiture proceedings property owners can file a motion for return of their property pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. *Id.* Third, a property owner can avail himself of federal remission and mitigation procedures (19 U.S.C. § 1618 and 19 C.F.R. § 162.31(a)) and some relief is granted in an "estimated 75% of the petitions . . ." *$8,850*, 461 U.S. at 558. Fourth, any delay in acting on a mitigation request can be prevented by filing suit to compel the agency to act. 5 U.S.C. § 706(1). Fifth, a 10% bond can be posted to secure the release of vehicles and other essential items. 19 U.S.C. §§ 1608 and 1614.

None of those interim remedies was available to Plaintiffs. The Illinois DAFPA does not expressly prohibit interim remedies like those that are always available in federal forfeiture actions. Devine, however, does not provide any process other than the forfeiture trial, which is often delayed for many months following the seizure. Because Plaintiffs' cause of action was necessitated by the absence of an interim remedy, like those that the federal government offers, the case does not warrant review by this Court.

## II. The Court Did Not Impose A Mandatory Injunction.

The Seventh Circuit remanded the case to the District Court to "fashion appropriate relief consistent" with the Court's opinion. (P. App. 10). The Court did not make findings of fact, did not order a specific time table for the post-seizure hearings, and did not attempt to describe the scope of the hearings. *Id.* Devine cannot in good faith maintain that interim, post-seizure hearings are offered because he insists that the only process that is due is the forfeiture trial. (Pet. at 23-27). So, all the Seventh Circuit ordered was an application of the *Mathews* criteria to the facts, once all of the facts are known. If it were to turn out that Devine is not to blame or some as yet undisclosed interim relief actually exists, the District Court would be required to take those facts and that remedy into account.

## CONCLUSION

For all of these reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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