Warrantless Seizures in Forfeiture Cases: Due Process and *Alvarez v. Smith* in the Supreme Court

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Summary

Alvarez v. Smith became moot while pending before the United States Supreme Court. At the time, the Court had agreed to decide whether a six-month delay between a state's seizure of property and its forfeiture hearing requires additional procedural safeguards. Traditionally, forfeiture hearing delays have been judged by the speedy trial standards of *Barker v. Wingo*. The Court had been asked to decide whether they should instead be judged by the general due process standards of *Mathews v. Eldridge*.

Alvarez v. Smith arose in Chicago where a group of property owners filed a civil rights class action against city and state officials over city practices under the Illinois drug forfeiture statute. Under the statute, cars and trucks regardless of their value and money or other property valued at under $20,000 may be seized without a warrant by officers with probable cause to believe it is subject to confiscation. The forfeiture hearing may be held as late as 187 days after the seizure. The Smith group argued their property could not be held for that long without intervening safeguards against hardship and erroneous seizure. The district court dismissed their suit using the higher threshold *Barker* speedy trial standards to assess the delay and its impact. The Seventh Circuit Court of Appeals reversed. It felt use of the *Mathews* standards better suited and returned the case to the lower court for determination of an appropriate remedy. At that point, the Supreme Court granted certiorari.

Before the Court could rule, however, the city returned the cars it had seized from members of the group and settled the group's claims relating the other property seized. In the absence of a case or controversy, the Court vacated the Seventh Circuit opinion and returned the matter to the lower court.

The Illinois statute tracks the federal statutes in several respects. Thus, had the Seventh Circuit view prevailed, changes in federal law might have been required.

Related reports include CRS Report 97-139, *Crime and Forfeiture*, by (name redacted), which is also available in abbreviated form as CRS Report RS22005, *Crime and Forfeiture: In Short*, by (name redacted).

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Introduction

How long may a city hold property, seized for forfeiture purposes, before it must justify either the validity of its seizure or its right to confiscation? And should the delay be judged by speedy trial or general due process standards? The speedy trial standards focus on which party is most responsible for the delay and the consequences of the delay for the accused. The due process standards ask whether a delay-resulting procedure involves a risk of erroneous governmental deprivation of an individual's interests; the extent to which additional safeguards will mitigate or eliminate that risk; and the costs to the government (including administrative burdens) should those safeguards be required. The United States Supreme Court agreed to consider the issue in *Alvarez v. Smith* (Doc. No. 08-351), cert. granted, 129 S.Ct. 1401 (2009), but the case became moot before the Court could address the issue. Had the property owners prevailed, adjustments in federal law might have been required.

The case was complicated by several factors. First, the Supreme Court has already said in *United States v. $8,850 (Vasquez)*,[1] that the due process consequences of delays between seizure and a forfeiture hearing are to be judged using the speedy trial standards of *Barker v. Wingo*.[2] Second, the lower federal appellate court instead found applicable the general due process standards of *Mathews v. Eldridge*,[3] but remanded to the district court to determine the appropriate remedy.[4] This failure to identify the necessary remedial safeguards could have made Supreme Court review more difficult, since one of the *Mathews* factors is the extent of governmental inconvenience posed by the safeguards proposed in the name of due process. Third, the appropriate remedy may be elusive since the same level of proof is required to justify both the seizure and final confiscation—probable cause. But the fatal complication was mootness. Before the Court could rule on the merits, the city returned the cars it had seized from the claimants and settled their other claims.[5]

Background

Forfeiture is the confiscation of property as a consequence of the property's relation to some criminal activity.[6] Forfeiture comes in one of two forms, depending upon the procedures used to accomplish confiscation. Criminal forfeiture involves the confiscation of the property following conviction of the property owner.[7] Civil forfeiture involves the confiscation of property following a civil proceeding in which the property itself is often treated as the defendant.[8] In most cases, due process permits civil forfeiture notwithstanding the innocence of property owner.[9] Neither

[1] 461 U.S. 555, 564 (1983).

[2] 407 U.S. 514 (1972).

[3] 424 U.S. 319 (1976).

[4] *Smith v. City of Chicago*, 524 F.3d 834, 838-39 (7th Cir. 2008).

[5] *Alvarez v. Smith*, 130 S.Ct. 576, 578 (2009).

[6] For a more detailed discussion of federal forfeiture law see CRS Report 97-139, *Crime and Forfeiture*, by (name re dacted).

[7] *E.g.*, 18 U.S.C. 982.

[8] *E.g.*, 18 U.S.C. 983.

[9] *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663, 680 (1974); *Bennis v. Michigan*, 516 U.S. 442, 453 (1996).

magistrate nor court need necessarily approve the seizure of personal property for forfeiture purposes.[10] The law enforcement agencies which seize forfeitable property often share in the distribution of proceeds following confiscation.[11]

Under the Illinois law at issue, cars and other conveyances used to facilitate or conceal controlled substance offenses are subject to forfeiture. The same is true of any money or thing of value furnished, used, or acquired in the course of a controlled substance offense.[12] Property may be seized under process or a warrant. Alternatively, it may be seized without a warrant or process, if there is probable cause to believe that the property is subject to forfeiture and seizure would be otherwise reasonable.[13] The state may confiscate the property administratively (without a court hearing), if the forfeiture is uncontested and the property is valued at under $20,000 or is a car or other conveyance.[14] To secure his day in court, a person with an interest in the property must file a claim along with a bond equal to 10% of the value of the property (90% of which is returned if the property is found not to be forfeitable).[15]

The statutory deadlines are such that several months will ordinarily pass before judicial proceedings begin.[16] In the judicial proceedings, the state has the burden of establishing probable cause to believe that the property is subject to confiscation, after which the burden shifts to the claimant to show by a preponderance of the evidence that his interest in the property is not forfeitable.[17] Sixty-five percent of the proceeds of any uncontested or judicially approved confiscation are distributed to the law enforcement agency which conducted the investigation,[18] ordinarily the agency which seizes the property.

The property owners in *Smith* filed a class action suit under 42 U.S.C. 1963 against city and state officials asserting that the Illinois procedure constituted a violation of due process because of its failure to provide a prompt post-seizure probable cause hearing.[19] The district court dismissed on the basis of circuit precedent.[20] A decade and a half earlier, the same Illinois procedure had been challenged for want of a prompt post-seizure hearing in *Jones v. Takaki*.[21] Then, the circuit court felt bound by the Supreme Court's *$8,850 (Vasquez)* decision, which held that the *Barker v. Wingo* speedy trial factors govern the outcome, that is, "the length of delay, the reason for the delay, the defendant's assertion of this right, and prejudice to the defendant."[22] On the basis of a second Supreme Court decision, *United States v. Von Neumann*,[23] *Jones* rejected the argument that in light of the anticipated delay due process required a preliminary judicial probable cause

[10] *E.g.*, 18 U.S.C. 981(b)(2).

[11] *E.g.*, 18 U.S.C. 981(e).

[12] 720 ILL. COMP. STAT. 570/505(a)(3), (a)(4), (a)(5).

[13] 720 ILL. COMP. STAT. 570/505(b).

[14] 725 ILL. COMP. STAT. 150/6(D).

[15] 725 ILL. COMP. STAT. 150/6(C).

[16] 725 ILL. COMP. STAT. 150/6; *Smith v. City of Chicago*, 524 F.3d at 835-36.

[17] 725 ILL. COMP. STAT. 150/9.

[18] 720 ILL. COMP. STAT. 570/505(g).

[19] *Smith v. City of Chicago*, 524 F.3d at 835.

[20] *Id.*

[21] *Jones v. Takaki*, 38 F.3d 321 (7th Cir. 1994).

[22] *Id.* at 323, quoting *United States v. $8,850 (Vasquez)*, 461 U.S. at 564.

[23] 474 U.S. 242 (1986).

determination.[24] *Von Neumann* held that due process did not require prompt consideration of a petition to release forfeitable property as a matter of administrative grace.[25]

In *Smith*, the Seventh Circuit Court of Appeals reversed the district court's decision to dismiss.[26] It did so because a Second Circuit opinion helped persuade it that the foundation of its decision in *Jones* had been eroded.[27] After *$8,850 (Vasquez)*, *Von Neumann*, and *Jones*, the Supreme Court had decided *United States v. James Daniel Good Real Property*.[28] There, the Court observed that, absent exceptional circumstances, due process required pre-seizure notice and an opportunity to be heard in forfeiture cases.[29] More to the point, it declared that the question of whether the circumstances of a particular case warranted an exception must be answered using the factors identified in *Mathews v. Eldridge*: "the risk of erroneous deprivation of [a private] interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose."[30]

Some years later, the Second Circuit faced a due process challenge to the New York City civil forfeiture procedure used in the driving-under-the-influence cases, *Krimstock v. Kelly*.[31] The court, in an opinion by then Judge Sotomayor, concluded that vehicle owners had a due process right to "ask what justification the City has for retention of their vehicles during the pendency of [forfeiture] proceedings, and to put that question to the City at an early point after seizure in order to minimize any arbitrary or mistaken encroachment upon plaintiff's use and possession of their property."[32] Moreover, the court asserted, the *Mathews* analysis governs the due process inquiry into the prompt review of the government's seizure and retention of private property.[33]

The Seventh Circuit in *Smith* endorsed the views of the Second Circuit expressed in *Krimstock*.[34] It remanded with instructions to identify a procedure (1) under which a property owner might contest the validity of the seizure and the continued governmental retention of his or her property, and (2) under which vehicles and property other than cash might be released under bond or other security order pending a forfeiture proceeding on the merits.[35]

Among the other circuits to consider the question, the Sixth, Ninth, and Eleventh Circuits appear to continue to apply *Barker v. Wingo* factors to the question of whether various pre-trial forfeiture delays offend due process.[36]

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[24] *Jones v. Takaki*, 38 F.3d at 324.

[25] *United States v. Von Neumann*, 474 U.S. at 249-50.

[26] *Smith v. City of Chicago*, 524 F.3d at 839.

[27] *Id.*

[28] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

[29] *Id.* at 48-9.

[30] *Id.* at 53, citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[31] *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

[32] *Id.* at 53.

[33] *Id.* at 68.

[34] *Smith v. City of Chicago*, 524 F.3d at 838.

[35] *Id.* at 838-39.

[36] *United States v. Salti*, 579 F.3d 656, 672 (6th Cir. 2009); *United States v. Kaley*, 579 F.3d 1246, 1252-260 (11th Cir. 2009); *United States v. Approx. $1.67 million (Hargot)*, 513 F.3d 991, 1000-1001 (9th Cir. 2008).

The Supreme Court granted certiorari to consider

> In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[37]

Before the Supreme Court

Illinois officials raised five points in their argument before the Court.[38] First, the Court has historically held that "a separate proceeding, prior to the forfeiture hearing itself, was unnecessary to determine the reasonableness of the initial seizure."[39] Second, *$8,850 (Vasquez)* and *Von Neumann* provide appropriate standards for purposes due process analysis.[40] Third, given the attendant additional burdens on the government, the Constitution does not require an interim, adversarial hearing.[41] Fourth, the Illinois statute is modeled after the federal statute, neither of which offends due process, in light of the right under either law to seek return of seized property.[42] Fifth, the Illinois system survives due process scrutiny under either the *Barker* or *Mathews* standard.[43]

The property owners answered, first, that due process assured them of a hearing within a meaningful time, not after the six months that the Illinois procedure contemplated.[44] Second, *Mathews* supplies the appropriate standard by which to assess the due process implications of the delay.[45] Third, application of *Mathews* here is not inconsistent with the Court's decisions in *$8,850 (Vasquez)* or *Von Neumann*.[46] Fourth, the specific Illinois forfeiture procedures preempt the more general Illinois return of property statute.[47] Finally, an informal hearing or the opportunity to post a bond is constitutionally required and is feasible.[48]

The United States filed an amicus brief in support of state and city officials which argued that the final "forfeiture hearing provides adequate pre-forfeiture process unless it is delayed beyond the time that the government's valid administrative interests reasonably require."[49]

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[37] *Alvarez v. Smith* (Doc. No. 08-351), cert. granted, 129 S.Ct. 1401 (2009).

[38] Brief for Petitioner, Alvarez v. Smith, No. 08-351 (U.S. 2009).

[39] *Id.* at 35, citing *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 318 (1818).

[40] *Id.* at 36.

[41] *Id.* at 46.

[42] *Id.* at 65.

[43] Reply Brief for Petitioners, Alvarez v. Smith, No. 08-351, at 28 (U.S. 2009).

[44] Brief for Respondents, Alvarez v. Smith, No. 08-351, at 14 (U.S. 2009).

[45] *Id.* at 17.

[46] *Id.* at 31.

[47] *Id.* at 41.

[48] *Id.* at 44.

[49] Brief for the United States, as Amicus Curiae Supporting Petition, Alvarez v. Smith, No. 08-351, at 7 (U.S. May 2009).

Alvarez v. Smith

The Court learned upon inquiry that the groups' claims had been resolved.[50] It felt it had no choice but to dispose of the case without reaching the merits. The Supreme Court's jurisdiction is predicated on the existence of a "case or controversy."[51] Since the group had been denied certification to act as representatives in a class action, they stood before the Court only on the basis of their individual claims. The Court unanimously agreed that when those claims were settled, disputes over the appropriate procedure to resolve them became moot and the presence of a case or controversy disappeared.[52]

The members of the Court were only slightly more divided over whether the Seventh Circuit opinion should be vacated or allowed to stand. The prevailing statute affords the Court considerable latitude.[53] The majority favored application of a general rule under which the judgment in a moot case is vacated.[54] Justice Stevens alone would have opted for a rule under which a judgment pending on the Court's docket would stand when mooted by an intervening settlement by the parties.[55]

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[50] *Alvarez v. Smith*, 130 S.Ct. 576, 578 (2009).

[51] U.S. Const. Art. III, §2.

[52] *Alvarez v. Smith*, 130 S.Ct. at 578.

[53] 28 U.S.C. 2106.

[54] *Alvarez v. Smith*, 130 S.Ct. at 583.

[55] *Alvarez v. Smith*, 130 S.Ct. at 583 (Stevens, J., concurring in part and dissenting in part) (2009).