No. _____

In the Supreme Court of the United States

LENA SUTTON ***AND*** HALIMA CULLEY,

Applicants,

v.

TOWN OF LEESBURG, ALABAMA, ATTORNEY GENERAL, STATE OF ALABAMA; DISTRICT ATTORNEY OF THE 13TH JUDICIAL CIRCUIT (MOBILE COUNTY); CITY OF SATSUMA, ALABAMA

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

UNOPPOSED APPLICATION FOR A 45-DAY EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To: The Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit

Applicants Lena Sutton and Halima Culley, without opposition, respectfully seek a 45-day extension from November 28, 2022, to January 12, 2023, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in the above-captioned matter.

Applicants' present deadline to file a certiorari petition is November 28, 2022. The Eleventh Circuit issued its precedential judgment in this matter on

July 11, 2022. On August 30, 2022, the Eleventh Circuit denied Applicants' timely rehearing petition. This time-extension application is being filed on November 4, 2022—more than 10 days before a certiorari petition is due. S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Copies of the Eleventh Circuit's precedential opinion and subsequent denial of rehearing are included with this application. *See* Appendix (cited as "App.").

The following grounds support this time-extension application:

1. This case is about whether the due process clause of the Fourteenth Amendment allows the state of Alabama to retain property seized incident to arrest pursuant to Alabama's Civil Asset Forfeiture ("CAF") statute, Ala. Code § 20-2-93 (1975), pendent lite, without a prompt, post-deprivation hearing concerning whether the state/municipality may retain said property during the pendency of civil asset forfeiture litigation, or whether there is a less restrictive means for the state to secure its interest.

2. The case turns upon which test for procedural due process claims governs the question of what process is due one who has been deprived of property, pendente lite, when a CAF proceeding has been instituted by the State. The Eleventh Circuit opinion held that it is bound by its precedent to apply the speedy trial test articulated in Barker v. Wingo, 47 U.S. 514 (1972), as opposed to the test under Matthews v. Eldridge, 424 U.S. 319 (1975), which is "the traditional test employed in order to determine what process is due before a deprivation of property at the hands of the state may be sustained". U.S v. Kaley, 579 F. 3d 1246, 1260 (11th Cir. 2009).

3. There is a split amongst the circuits on the question. The Eleventh Circuit opinion, App. P. 9 specifically references that "at least one circuit has taken their [Applicants'] view." Krimstock v. Kelly, 306 F. 3d 40 (2d Cir, 2002) (Sotomayer, J). The issue in Krimstock mirrored the issue in this case- whether due process demands that the owner of a vehicle receive a prompt, post-deprivation hearing as to continued retention of the vehicle, pendente lite. The Court, explicitly rejecting the Barker test adopted by the Eleventh Circuit, stated the following:

> ...[w]e find that the Due Process Clause requires that claimants be given an early opportunity to test the probable validity of further deprivation, including probable cause for the initial seizure, and to ask whether other measures, short of continued impoundment, would satisfy the legitimate interests of the City in protecting the vehicles from sale or destruction pendente lite.
>
> The City argues that the Mathews v. Eldridge balancing test is displaced by Supreme Court's decision to apply the speedy trial test, and not the Mathews inquiry, in examining the constitutionality of any delay in the return of property subject to future civil forfeiture proceedings. See, United States vs. $8,850, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed. 2d 143 (1983) (applying the speedy trial test set forth in Barker v. Wingo, 407 U.S. 513, 33 L.Ed.2d 101, 02 S. Ct. 2182 (1982), in finding that an eighteen-month delay in filing a customs forfeiture action did not violate constitutional due process guarantees.)
>
> We disagree. 'plaintiffs' claim does not concern the speed with which civil forfeiture proceedings themselves are instituted or conducted.' Instead, plaintiffs seek a prompt post-seizure opportunity to challenge the legitimacy of the city's retention of the vehicles while those proceedings are conducted. The application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings . . . The impoundment of property – or the incarceration of a criminal defendant –

> certainly increases the hardship worked by any delay. The Constitution, however, distinguishes between the need for prompt review of the propriety of continued government custody on the one hand, and delays in rendering final judgment, on the other.

Krimstock II, 306 F.2d at 68.

4. There is a clear split between the Eleventh Circuit's holding in this case and the Second Circuit in Krimstock. One of the "compelling" reasons for granting a writ of certiorari, of course, is where "a United States court of appeals has entered a decision in conflict with the decision of another United States Court of appeals on the same important matter..." S. Ct. R. 10 (a). The conflict between the circuit courts is manifest, as explained herein, and the determination of process due those who have had property seized is certainly an important matter where each state, and the Federal government 18 U.S.C. § 981, have statutory civil asset forfeiture provisions allowing for the seizure of property incident to an arrest See, 18 U.S.C. § 981 (b)(2) (B)(i) affecting thousands of property owners.

5. The Eleventh Circuit itself has recognized that reliance upon Barker in this context is a square peg in a round hole. The Court stated, "If we were writing on a blank slate today, we would be inclined as Judge Tjoflat suggests in his special concurrence, to apply the test announced by the Supreme Court in Mathews." Kaley, 579 F. 3d at 1259. This statement followed the recognition by the Court in United States v. Register, 182 F. 3d 820, 834 (11th Cir. 1999) that, "We appear to be the only circuit holding that, although pretrial restraint of assets needed to refer counsel implicates the Due Process Clause, the trial itself satisfies this requirement."

6. The Register Court specifically recognized the Eleventh Circuit's outlier position, stating, "Most circuits have addressed this issue either before or after Monsanto III and have concluded that the Fifth Amendment[1] requires a pretrial though not necessarily pre-seizure probable cause hearing[2]," Register, 182 F. 3d at 835, before conceding in Kaley, supra that, "The more recent cases have used the balancing test employed in Matthews." Kaley, 579 F. 3d at 1260.

7. Given the importance of the issue, Applicants respectfully request a 45-day extension of the deadline to file a certiorari petition.

8. Good cause exists to grant this request. Applicant's counsel has competing obligations in his practice between now and the Thanksgiving holiday where the petition for certiorari would be due. Applicant's counsel has matters pending in both state and federal courts that must be completed in this time frame making it difficult to adequately prepare a petition for certiorari on an issue of rational importance during this time. Moreover, Counsel for Applicants have consulted with opposing Counsel and no party opposes this request for an extension because no party will be prejudiced by it.

9. Applicants thus respectfully request that the Court extend the time within which to file a certiorari petition to and including January 12, 2023.

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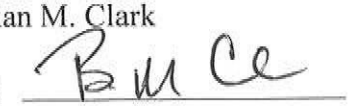
[1] Register was a Fifth Amendment case considering due process restraints on the Federal government, while the case, sub judice is Fourteenth Amendment due process case concerning a state law procedure. Analytically, this makes no difference because "[t]he rights protected by the two clauses are coextensive." Screws v. United States, 325 U.S. 91, 123 (1945).

[2] The Register Court, supra at 835, went on to list those circuits it viewed as having held that a pretrial probable cause hearing as to continued retention is required to meet due process standards. United States v. Jones, 160 F. 3d 641, 647 (10th Cir. 1998); U.S. v. Monsanto, 924 F. 2d 1186, 1195 (2nd. Cir. 1991); United States v. Moya-Gomez, 860 F. 2d 706, 728-29 (7th Cir. 1988); U.S. v. Harvey, 814 F. 2d 905, 929 (4th Cir. 1987), superseded as to other issues, In re Forfeiture Hearings, 837 F. 2d 637 (4th Cir. 1988) (en banc), aff'd 491 U.S. 617; U.S. v. Crozier, 777 F. 2d 1376, 1384 (9th Cir. 1985); U.S. v. Lewis, 759 F. 2d 1316, 1324-25 (8th Cir, 1985), cf, U.S. v. Long, 654 F. 2d 911, 915 (3rd Cir. 1981). "The more recent cases have used the balancing test employed in Matthews." Kaley, 579 F. 3d at 1260.

Dated: November 4, 2022

Respectfully submitted,

Brian M. Clark

By: 

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APPENDIX

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13805

Non-Argument Calendar

HALIMA TARIFFA CULLEY,
on behalf of herself and those similarly situated,

Plaintiff-Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
DISTRICT ATTORNEY OF THE 13TH JUDICIAL CIRCUIT
(Mobile County),
CITY OF SATSUMA, ALABAMA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:19-cv-00701-TFM-MU

No. 21-13484

Non-Argument Calendar

LENA SUTTON,
On behalf of herself and those similarly situated
as described below,

Plaintiff-Appellant,

versus

LEESBURG, ALABAMA, TOWN OF,

Defendant-Appellee,

STATE OF ALABAMA,

Intervenor-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:20-cv-00091-ACA

Before WILSON, JORDAN, and NEWSOM, Circuit Judges.

PER CURIAM:

This appeal is consolidated from two cases, one brought by Ms. Halima Culley, and the other by Ms. Lena Sutton. Both Appellants seek monetary damages for alleged violations of, and conspiracy to violate, their Eighth and Fourteenth Amendment rights. Ms. Culley also seeks injunctive relief. After careful review, we lack jurisdiction to consider the claims for injunctive relief because they are moot. And as to the remaining claims, the district courts correctly held that they are foreclosed by binding precedent. We thus affirm.[1]

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[1] The Appellees offer several additional reasons to affirm: claim preclusion, issue preclusion, and the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 44 (1971). Because these bases are not jurisdictional, and because the rulings below are due to be affirmed in any event, we need not reach these issues. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005) ("Preclusion is not a jurisdictional matter."); *Walker v. City of Calhoun*, 901

I

We assume the parties are familiar with the factual and procedural background of these consolidated cases, and thus recount only the facts necessary to resolve this appeal.

We begin with the Culley Action. On February 17, 2019, Ms. Culley's son was pulled over by police while driving a car registered to his mother. Police arrested him and charged him with possession of marijuana and drug paraphernalia in Satsuma, Alabama. The City of Satsuma also seized the vehicle incident to the arrest. Ms. Culley tried to retrieve the vehicle, but to no avail. On February 27, 2019, the State of Alabama filed a civil asset forfeiture action in state court. After 20 months, the state court granted Ms. Culley summary judgment, finding that she was entitled to the return of her vehicle under Alabama's innocent-owner defense. *See* Ala. Code § 20-2-93(h).

Next, the Sutton Action. In February 2019, a friend of Ms. Sutton's took her car to run an errand. While he was en route, the town of Leesburg police pulled him over. After a search of the vehicle turned up methamphetamine, the police arrested the driver and seized Ms. Sutton's vehicle. Ms. Sutton, like Ms. Culley, eventually obtained summary judgment in a civil forfeiture case based

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F.3d 1245, 1254 (11th Cir. 2018) (The *Younger* abstention doctrine is not a jurisdictional matter).

on the innocent-owner defense—but not until more than a year after the seizure of her vehicle.

Ms. Culley and Ms. Sutton each filed class actions in federal district court. Ms. Culley sued three defendants in the Southern District of Alabama: the Attorney General of the State of Alabama, the District Attorney for the 13th Judicial Circuit of Alabama (together, the State or the State Defendants), and the City of Satsuma. Ms. Sutton sued the Town of Leesburg in the Northern District of Alabama, after which the State of Alabama intervened in the action. Both plaintiffs sued under 42 U.S.C. § 1983, claiming, as relevant here, that the defendants' failure to provide a prompt post-deprivation hearing violated their rights under the Eighth and Fourteenth Amendments. They also brought § 1983 conspiracy claims.

The defendants prevailed in both actions. In the Culley Action, the district court granted the State Defendants' motions for judgment on the pleadings, and granted the City of Satsuma's motion to dismiss. In the Sutton Action, the district court dismissed Ms. Sutton's Eighth Amendment claim and later granted summary judgment to the Town of Leesburg on her Fourteenth Amendment claim. On the Fourteenth Amendment claim, both district courts held that binding Eleventh Circuit precedent—particularly our decision in *Gonzales v. Rivkind*, 858 F.2d 657 (11th Cir. 1988), required the application of the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). And under that test, the courts held that the plaintiffs' claims failed. Neither plaintiff contended below that she

could prevail under the *Barker* test—only that it should not apply. As to the Eighth Amendment claims, the courts held that the retention *pendente lite*—that is, during litigation—of a vehicle seized under Alabama's Civil Asset Forfeiture Statute was not a "fine" and thus could not violate the Eighth Amendment's Excessive Fines Clause.

II

We review de novo the grant of a motion to dismiss, a motion for judgment on the pleadings, and a motion for summary judgment. *See Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1207 (11th Cir. 2018).

III

Before reaching the merits, we must satisfy ourselves that we have jurisdiction over all of the issues before us. Under Article III of the Constitution, we lack jurisdiction to decide questions that have become moot. *Powell v. McCormack*, 395 U.S. 486, 512–13 (1969). A case generally becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496. The State Defendants argue that Ms. Culley's claims against them for prospective injunctive relief are moot. Once she obtained the return of her vehicle, they argue, no further prospective injunctive relief could be granted, and thus there is no live controversy.

Ms. Culley counters that her class claims fall within an exception to mootness for claims that are "inherently transitory,"

meaning they are so fleeting that they are bound to become moot before class certification. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 76 (2013). In such cases, "where the transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review, certification [can] potentially 'relate back' to the filing of the complaint." *Id.* We find, however, that this exception to mootness does not apply here. Ms. Culley's state forfeiture proceedings began in February 2019. She filed this suit seven months later. Thirteen months after that, her state forfeiture proceedings finally concluded and her vehicle was returned to her. If Ms. Culley were correct that the Defendants had no right to hold her vehicle during the state forfeiture proceedings without a probable cause hearing, her claims for injunctive relief would have been live during the lengthy pendency of the state court litigation. Her claims for injunctive relief, then, are not the sort of fleeting claims that could trigger the inherently-transitory exception to mootness. As a result, these claims are moot, and we lack jurisdiction to address them.

A live controversy remains, however, as to Ms. Culley's claim for monetary damages against the City of Satsuma, and as to Ms. Sutton's claim for monetary damages against the Town of Leesburg.[2] The Appellants make two arguments on appeal: one under the Fourteenth Amendment and one under the Eighth Amendment. We address those arguments in turn.

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[2] There are no claims for monetary damages against the State Defendants.

A

The first argument raised by the Appellants is that the Appellees violated their due process rights under the Fourteenth Amendment by retaining their vehicles during litigation without a showing of probable cause that the vehicles were forfeitable. We have addressed the requirements of due process in the context of a post-seizure challenge pending a final forfeiture trial. *See Gonzales*, 858 F.2d 657. In *Gonzales*, the Immigration and Naturalization Service had seized the claimants' vehicles which were being used to transport undocumented immigrants. *Id.* at 659. The owners of the vehicles brought a class action challenging the forfeiture procedures on due process grounds. *Id.* To analyze the due process claim, the district court had applied the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1975), and found that they weighed in the claimants' favor. *Gonzales v. Rivkind*, 629 F. Supp. 236, 240 (M.D. Fla. 1986). The district court had thus ordered that the claimants be provided a probable cause hearing within 72 hours of seizure. *Id.* On appeal, we reversed, holding that two Supreme Court decisions, *United States v. $8,850*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986), were controlling and required us to apply *Barker* rather than *Mathews*. *See Gonzales*, 858 F.2d at 661–62. Applying the *Barker* factors, we then held that a merits hearing on forfeiture, "if timely, affords a claimant of seized property all process to which he is constitutionally due." *Id.* at 661.

Here, the Appellants say that the district court erred by analyzing due process under *Barker* rather than *Mathews*. They argue

that while the *Barker* test governs the timeliness of a merits hearing on forfeiture, they are seeking something different—a probable cause hearing to determine whether they can retain their property during the pendency of litigation. The Appellants note that at least one circuit has taken their view. *See Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002). We remain bound, however, by our prior precedent "unless and until [it] is overruled by [our] Court sitting en banc or by the Supreme Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). And in *Gonzales* we rejected the argument that due process requires the sort of probable cause hearing the Appellants seek. We held instead that a timely merits hearing affords a claimant all the process to which he is due, and that the timeliness analysis is governed by *Barker*. *See Gonzales*, 858 F.2d at 661–62. That precedent is dispositive here, and we thus affirm the holdings of the district courts.

B

The Appellants argue next, without any on-point authority, that the temporary forfeiture of their vehicles violates the Eighth Amendment's provision that excessive fines shall not be imposed. At the founding, a "fine" meant "a *payment* to a sovereign as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (emphasis added). As a result, a *forfeiture* can constitute a fine when it is "at least partially punitive." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). Temporary retention of property, on the other hand, cannot be a payment at all because it is not permanent. *See Coleman v. Watt*, 40 F.3d 255, 263 (8th Cir. 1994).

Only after property is permanently forfeited and ownership changes can a claimant challenge the forfeiture as an excessive fine. Therefore, we affirm in this regard.

IV

In conclusion, we lack jurisdiction to hear Ms. Culley's claim against the State Defendants for injunctive relief because that controversy is no longer live. As to the Appellants' monetary damages claims under the Fourteenth and Eighth Amendments, binding precedent forecloses those claims. And consequently, the Appellants' conspiracy claims must also fail. *See Spencer v. Benison*, 5 F.4th 1222, 1234 (11th Cir. 2021) (holding that "an underlying violation of [ ] constitutional rights . . . is required to sustain a § 1983 conspiracy claim"). Accordingly, we dismiss the appeal in part and affirm in part.

DISMISSED IN PART; AFFIRMED IN PART.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13805-GG

HALIMA TARIFFA CULLEY,
on behalf of herself and those similarly situated,

Plaintiff - Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
DISTRICT ATTORNEY OF THE 13TH JUDICIAL CIRCUIT
(Mobile County),
CITY OF SATSUMA, ALABAMA,

Defendants - Appellees.

Appeal from the United States District Court
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No. 21-13484-GG

LENA SUTTON,
On behalf of herself and those similarly situated
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Plaintiff - Appellant,

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Defendant - Appellee,

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Intervenor - Appellee.

Appeals from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 4:20-cv-00091-ACA

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, JORDAN, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

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