

No. _____

In the
Supreme Court of the United States

GERALD S. OSTIPOW,
individually and as Personal Representative
of the Estate of Royetta L. Ostipow,
Petitioner,

v.

WILLIAM L. FEDERSPIEL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the non-return and indefinite retention of non-forfeited private property (or its monetary equivalent), when initially seized for a criminal investigation, constitute a taking when the criminal investigation and prosecution have long been completed?

RELATED PROCEEDINGS

Ostipow I

United States District Court (E.D. Mich.):
Ostipow v. Federspiel, No. 16-cv-13062

United States Court of Appeals (6th Cir.):
Ostipow v. Federspiel, No. 18-2448

Ostipow II

United States District Court (E.D. Mich.):
Ostipow v. Federspiel, No. 21-cv-11208

United States Court of Appeals (6th Cir.):
Ostipow v. Federspiel, No. 22-1414

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Gerald S. Ostipow, both individually and as Personal Representative of the Estate of his late wife Royetta L. Ostipow. Respondent is Sheriff William L. Federspiel sued in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald S. Ostipow seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is (App. 1a-10a) is available at 2023 U.S. App. LEXIS 25868. Its order denying rehearing en banc (App. 65a-66a) is available at 2023 U.S. App. LEXIS 30661. The district court's opinion and order (App. 11a-31a) is unpublished but available at 2022 U.S. Dist. LEXIS 79111.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on September 29, 2023, App. 1a-10a, and denied a timely petition for rehearing on November 16, 2023, 65a-66a. On January 9, 2024, Justice Kavanaugh extended the time to petition for a writ of certiorari to and including April 14, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISION INVOLVED**

The Fifth Amendment to the Constitution provides, in relevant part, “nor shall private property be taken for public use without just compensation.” U.S. Const. amend. V.

Section 1983 of Title 42, United States Code, 42 U.S.C. § 1983, in relevant part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

INTRODUCTION

This case presents a narrow but important issue about the operations and administration of our Nation's civil asset forfeiture laws – what is supposed to happen *after* law enforcement attempts to forfeit private property through a state forfeiture process, but fails to successfully do so. Normally, one would expect a prompt return of the private property. E.g. *United States v. Francis*, 646 F.2d 251, 262 (6th Cir. 1981). But Sheriff William L. Federspiel refused and instead sold off the Ostipows' non-forfeited private property to pay for his agency's policing activities, equipment, and general departmental operations. Through the date of this Petition, some *fifteen years* after the sale, the Sheriff persists in his refusal to offer any compensation for the deprivation. Petitioner Gerald S. Ostipow asserts that such constitutes a taking requiring just compensation under the Fifth Amendment. His view is simple – when the basis for any temporary possession of private property by law enforcement ends but the government still refuses to return it, a taking requiring payment of just compensation ripens. Two circuits agree; one does not. The Court should resolve the conflict, and this is the right case for doing so.

STATEMENT OF CASE

After their retirements, Gerald and Royetta Ostipow purchased 3351 East Allan Road, a farmhouse in rural Shiawassee County, Michigan, as

a self-restoration project. Once interior renovations were nearing completion, the Ostipows allowed their adult-age (now deceased) son, Steven Ostipow, to move into the farmhouse, as a tenant, while the Ostipows continued to live at their regular home down the road. However, at the renovated farmhouse were several outbuildings where the Ostipows stored their possessions gathered over a lifetime: family heirlooms, trailers, a nearly restored 1965 Chevrolet Nova, a large tool collection, equipment, and other personal possessions.

In early 2008, the Sheriff's Department of neighboring Saginaw County received a tip that Steven was trying to grow marijuana just inside the restored farmhouse. Somehow the out-of-county law enforcement managed to persuade a Saginaw County judge to issue a search warrant to search the farmhouse in neighboring Shiawassee County. Found during that search were hidden immature marijuana plants. Deputies hauled away substantial amounts of private property without discerning regard to any rationale connection to any criminal activities. Steven was later arrested, prosecuted, and sentenced for the same. His parents had no clue about Steven's attempted green thumb. They have always denied knowledge of or participation in Steven's activities.

Thereafter, the Saginaw County Sheriff's Department filed a civil asset forfeiture action in the Saginaw County Circuit Court under Michigan's Public Health Code, MICH. COMP. LAWS § 333.7521 et

seq, as it then existed. That lawsuit sought forfeiture in favor of the Sheriff's Department as to the entirety of the farmhouse, all of its contents in the house and the outbuildings, and the Ostipows' heirloom firearm collection stored at Ostipows' primary home.

After an initial dispute about a default secured by the civil prosecutor's gamesmanship, the Michigan Court of Appeals remanded the forfeiture action back to the Saginaw County Circuit Court even though Saginaw County was recognized as the wrong judicial venue. The Michigan Supreme Court refused the Sheriff's Department's appeal of that decision.

When the matter eventually proceeded to trial on remand, the Sheriff, by counsel, lacked sufficient evidence that any of the property in the outbuildings at farmhouse was in any way connected to drug activity. Verdict was directed in the Ostipows' favor at the conclusion of the Sheriff's proofs. Ultimately, the Sheriff's Department did not succeed in obtaining a complete asset forfeiture from these two innocent retirees.

Later, following the trial on remand, the Ostipows again successfully appealed to the Michigan Court of Appeals. The result of the second appeal established the non-forfeitability of additional assets owned by the Ostipows, including Royetta's interest in all of the real property. Yet another unsuccessful appeal was undertaken by the Sheriff to the Michigan Supreme Court. The final quiet-title judgment confirmed

Gerald and Royetta had “maintained” their full ownership interest in certain property. App. 57a-64a.

When it came time for the return of the previously seized property in August 2016 after eight years of litigation, it was confirmed that the Ostipows’ property had been previously sold by the Sheriff’s Department rather than maintaining it. The Sheriff had spent the proceeds for policing activities, equipment, and general operations years before.

After demanding the return of their property and being disregarded, the Ostipows sued in federal court under various legal theories. Ultimately, that litigation concluded by the Sixth Circuit holding that federal relief was not yet available as the case was then postured: “while we deeply sympathize with the Ostipows, their remedy continues to be in state court.” App. 33a. The Sixth Circuit confirmed the Ostipows have a “property right” to the non-forfeited property listed in the state court judgment after the Sheriff’s decade-long forfeiture process failed. App. 44a. In its view, “at least so far,” “there is no evidence that property right ultimately will not be honored.” App. 44a-45a. It came to that conclusion because Sheriff Federspiel had “repeatedly recognized that debt” and represented to the Sixth Circuit that he was “working with the Saginaw County’s Prosecutor’s Office for guidance on the amount owed.” App. 45a. The Sixth Circuit opined that there had not been “sufficient time for the court or the Prosecutor’s Office to provide such guidance.” *Id.* Instead, the panel accepted Sheriff

Federspiel’s promise that “once that determination is resolved and the funds are allocated by the County Board of Commissioners,... the County Treasurer will pay the value of the judgment to the Ostipows.” *Id.* So the Sixth Court expressed that it “trusted” the representations of the Sheriff “that satisfaction will occur expeditiously.” App. 48a. That trust was later revealed to be solely misplaced.

After the Sixth Circuit’s decision in *Ostipow I*, the Sheriff did nothing despite his prior promises. After months of inaction, the Ostipows’ counsel wrote to Sheriff Federspiel on March 22, 2021 stating—

On August 2, 2016, a final judgment was entered between yourself (in your capacity as Sheriff) and the Ostipows. That judgment quieted title to property that you claimed was forfeit in your favor under the Michigan Public Health Code (with some property indeed being forfeit and some not). I have attached a copy of that judgment for your review.

Shortly thereafter, and consistent with that judgment, the Ostipows made a written demand for the return of their property to which you did not respond. A copy of that demand is also attached. On August 24, 2016, the Ostipows then filed suit against you in the United States District Court for the Eastern District of

Michigan. That matter ultimately concluded without recovery to the Ostipows on October 22, 2020.

In relevant part, the United States Court of Appeals for the Sixth Circuit acknowledged that the Ostipows had property rights established under the final judgment. It also held that there was no evidence that you wouldn't honor those property rights thus precluding any federal liability. This holding was premised on your written statements to the Court that you: recognized the debt; were working with the Saginaw County Prosecutor's Office for guidance on the amount owed; and through the County Treasurer, would pay the value of the property to the Ostipows. However, it was your position that you simply hadn't had time to complete these steps at the time the Ostipows filed suit on August 24, 2016, being 22 days after entry of the final state court judgment.

It has now been 1,694 days since the final judgment and 216 days since the Sixth Circuit rendered its opinion. Yet at the same time, you have made zero effort to provide the Ostipow family with the compensation they are due.

We recognize that you have disposed of most of, or all of, the property. In the federal suit, as you may remember, we prepared and disclosed to you care of your counsel valuations for that property. It is as follows:

- *Royetta Ostipow's Interest in 3551 East Allen Road, Owosso, Michigan: \$49,666.69 (1/3 of FMV)*
- *Personal Property Replacement: \$158,096.07*
- *1965 Chevrolet Nova: \$25,356.00*

If am requesting that you acknowledge in writing receipt of this letter within 14 days. If you do not acknowledge this letter in writing within 14 days, I will presume that it is your position that the Ostipows are not entitled to any compensation for the value of their property. I am further demanding that you pay the Ostipows the sum of \$233,118.76 within 21 days of this letter's date. Should you need more time, I will grant any reasonable extension so long as your request for the same is in writing and received within that timeframe.

App. 67a-70a. There was no response from the Sheriff.

After not getting any response and with the Sheriff's failures to take any action to effectuate the return of the Ostipows' property in the face of past representations to the Sixth Circuit panel, Petitioner Gerald S. Ostipow, both individually and as executor of his wife's estate (following the passing of Royetta), brought a second suit in state court (as the Sixth Circuit had directed) while pleading a new federal taking claim. Sheriff Federspiel removed the case to federal court. *Ostipow II* was commenced.

But *Ostipow II* had a major new wrinkle. Following *Ostipow I* and his promises, the Sheriff conceded that no steps were taken by him or any other Saginaw County official towards return property or otherwise facilitate payment. App. 26a. With a similar case back before it and faced with evidence of the patently broken promises to the Sixth Circuit, the District Court was at loggerheads on what to do. But in the end, history repeated itself. The District Court dismissed the takings claim. App. 24a-25a.

Presented to the Sixth Circuit once again, the *Ostipow II* panel rejected the Ostipows' key argument: the prolonged denial of Fifth Amendment compensation after a failed forfeiture amounts to violations of the Takings Clause. Mischaracterizing its prior decision as having "left it to the parties to ensure the [August 2, 2016] judgment's enforcement" in state court, the panel then held that demanding just compensation via the Fifth Amendment for the post-failed-forfeiture retention of the farmhouse and

its various contents seized as part of a criminal investigation “do not give rise to a federal claim for compensation.” App. 5a-6a.

Petitioner respectfully disagrees and this Petition timely follows.

REASONS FOR GRANTING THE PETITION

Petitioner charges the Saginaw County Sheriff with taking his and his wife’s private property for public use without just compensation. U.S. Const. amend. V. There has never been a challenge to the initial 2008 seizure, but instead the indefinite and apparently never-ending retention of private property once the criminal case terminated and forfeiture was unsuccessful in August 2016. In Petitioner’s view, a taking arises when the basis for ongoing possession of private property – i.e., a criminal investigation and prosecution – is completed and the government then refuses to return previously-seized yet non-forfeited private property.

The Sixth Circuit disagreed and, when doing so, misconstrued the just compensation obligation of the Fifth Amendment.¹ And more problematically, its

¹ It is well settled that seized property, other than contraband, should be returned to the rightful owner after the criminal proceedings have terminated. E.g. *Francis*, 646 F.2d at 262; *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977); *Savoy v. United States*, 604 F.3d 929, 932 (6th Cir. 2010); *Cooper v. City*

error is spreading. E.g. *Novak v. Federspiel*, 2024 U.S. Dist. LEXIS 58508 (E.D. Mich. Mar. 29, 2024). On the other hand, at least two other circuits have taken an opposite view, creating a substantial circuit split. This split of authority warrants the Court’s prompt attention.

I. Takings Jurisprudence

The Fifth Amendment to the U.S. Constitution guarantees that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. A taking occurs when governmental action deprives the owner of all or most of its property interest. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). It amounts to a taking when the government’s actions “are so complete as to deprive the owner of all or most of his interest in the subject matter.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).² Section 1983 provides a

of Greenwood, 904 F.2d 302, 304 (5th Cir. 1990); *United States v. Farrell*, 606 F.2d 1341, 1343 (D.C. Cir. 1979).

² A point missed by many is that the taking of property is generally not the unconstitutional act—it is the failure to pay just compensation that is the wrong. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 315 (1987) (the Fifth Amendment “is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking”). Payment is due immediately upon the taking. *Jacobs v. United States*, 290 U.S. 13, 17 (1933); *Seaboard Air Line R. Co. v. United States*, 261 U.S.

federal remedy, including for an unlawful uncompensated taking, where state law is “inadequate” or to otherwise “provide a remedy where a state remedy, though adequate in theory, was not available in practice.” *Monroe v. Pape*, 365 U.S. 167, 173-182 (1961); 42 U.S.C. § 1983; see also *Tyler v. Hennepin Cnty., Minn.*, 143 S. Ct. 1369 (2023). Michigan’s Public Health Code lacks any statutory authorization for the reviewing state court judge to enter a money judgment or otherwise order the return of the previously seized private property. See MICH. COMP. LAWS § 333.7521 et seq.³ Michigan courts cannot create such by equity. *Lash v. City of Traverse City*, 735 N.W.2d 628, 638-639 (Mich. 2007). Because the Michigan Legislature did not provide a remedy for an obstinate sheriff, Section 1983 can. *Monroe*, 365 U.S. at 173.

But even if arguendo such state law existed, any “post-taking remedies” that may be available to a property owner is no bar to the right to the Fifth Amendment’s right to full and immediate compensation arising at the time of the take. *Knick v. Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2170 (2019). “No matter what sort of procedures the government puts

299, 306 (1923). Thus, a Fifth Amendment “taking” occurs when a government (1) took property and (2) failed to contemporaneously compensate justly.

³ The Michigan Legislature has since revised this particular civil forfeiture statute, see 2019 Mich. Pub. Acts. 7, 8, and 9, but still has not corrected that shortcoming.

in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it.” *Id.* “[I]t is the existence of the Fifth Amendment right that allows the owner to proceed directly to federal court under § 1983.” *Id.* at 2171.

So that invites the question presented — does the non-return and indefinite-retention of non-forfeited private property, initially seized for a criminal investigation but not returned after the criminal prosecution is complete, constitute a taking. The Sixth Circuit says no. In its view, a claimed temporary seizure for prosecutorial purposes could never turn into a permanent deprivation as long as the government keeps merely promising to someday return the property, even if demonstratively the government never intends to do so. At least two other circuits have held otherwise creating a serious circuit split on a foundational constitutional protection.

II. The Third and Federal Circuits disagree with the Sixth Circuit.

In the Third Circuit’s *Frein* decision, a young man committed a heinous gun crime against two state troopers. See *PA Can’t Keep Guns Seized from Eric Frein’s Parents*, WNEP 16, Aug. 30, 2022, available at <http://olcplc.com/s/FYq7>. Law enforcement went to his home (which he shared with his parents) to locate evidence. Instead of only seizing the utilized firearm,

law enforcement also seized an additional forty-six other firearms belonging to the parents.

The young man was arrested, tried, convicted, and sentenced to death. The criminal investigation and prosecution of the son later concluded, but law enforcement would still not return the parents' private property, i.e. the firearms. The forty-six firearms were never sought to be forfeited. The government simply refused to act. The parents were forced to sue and asserted a Fifth Amendment takings claim.

After explaining that “the point of seizing evidence is to use it in a criminal proceeding,” the Third Circuit confirmed that “the government may hang onto it *through that proceeding.*” *Frein v. Penn. State Police*, 47 F.4th 247, 252 (3d Cir. 2022) (emphasis added). However, “[i]f the government wants to keep the property *after* the conviction becomes final, it needs some justification.” *Id.* at 253 (emphasis added). Examples securing title by civil or criminal forfeiture under state law by proving the owners' guilt. Or perhaps the government could establish that the seized property is contraband. When the circumstances “fall into none of these categories” and “the government has not compensated the parents for the [private property] either, their takings claim may proceed.” *Id.*

Petitioner finds himself in an even stronger position than that of the plaintiffs in *Frein*. The

criminal prosecution has long since ended and a forfeiture proceeding quieted title to the subject property in his (and now his wife's estate's) favor through a judgment that has been final for almost a decade. A taking claim clearly lies per *Frein*.

Similarly, the Federal Circuit also ruled contrary to the Sixth Circuit. *Jenkins* involved the owner of two vehicles. Believing the vehicle owner to be a drug dealer, the DEA seized both. The return of the vehicles was sought, but the government could not locate them. *Jenkins v. United States*, 71 F.4th 1367 (Fed. Cir. 2023). A taking occurred. There is constitutionally-based “liability for a taking if the property is not returned *after* the government interest in retaining the property ceases.” *Id.* at 1373-1374 (emphasis added).⁴

Notably, the government alternatively tried to suggest that a property owner must be the one to affirmatively activate or use local or state law to effectuate the return of property. But the Federal Circuit correctly observed *Knick* directs that “a property owner does not need to exhaust state court remedies in order to bring a federal Fifth Amendment takings claim.” *Id.* at 1374 (citing *Knick*, 139 S. Ct. at 2167-2168).

⁴ *Jenkins* was clear to correctly distinguish “insulat[ion]... from liability for an initial seizure” versus “takings liability for the period after seized property is no longer needed for criminal proceedings.” *Id.* at 1373.

The rule from the sister circuits in *Frein* and *Jenkins* is the right one. Whatever the reasons why the Sixth Circuit created the split, it nonetheless exists. Resolving the split justifies granting the petition.

III. Ideal Vehicle for an Important Question

This case is an exceptional vehicle to resolve the question presented. At the threshold, the Court is not required and does not need to first parse whether a forfeiture was warranted under Michigan's Public Health Code because the Sheriff has already argued for forfeiture and the state court established that forfeiture was inappropriate.

Second, there is no uncertainty that the dispute is outcome-determinative and, equally, there is no impediment to this Court's ability to decide it. Twice Petitioner has sought federal courts' help in protecting property rights after a state court held that the Sheriff's requested forfeiture lacked merit. The Sixth Circuit in the first instance said the Ostipows were in federal court too soon. And later it said Petitioner needed to use unknown and largely non-existing state court processes. Both notions have been expressly rejected by this Court in *Knick*. That means the heart of the dispute – the availability of a takings claim remedy under Section 1983 – is properly presented and ripe for review.

Third, the Sixth Circuit's decision created the circuit split between itself, *Frein*, and *Jenkins*, and then took the most contrarian view of the scope of the Fifth Amendment's protection when other circuits, when reviewing largely identical circumstances, reached the opposite conclusion.

Finally, and most importantly, the Sixth Circuit's view is incorrect on its face. Petitioner's private property was seized by the Sheriff. After seven years of litigation, the state court quieted title to most of that property in Petitioner's favor. Yet, in the eight years following judgment, Petitioner's private property has not been returned nor has he received any fair recompense. All that he has received is an endless stream of false promises, empty apathy, and inconsistent litigating positions.

Property cannot be *de facto* taken without compensation by official indifference—whether driven by disinterest, a profit motive, or even just plain animus. The Sixth Circuit's view rewards the Sheriff with a *heads-I-win, tails-you-lose* posture in perpetuity at the expense of fundamental fairness, the protection of private property, and what should be the constitutional mandate as correctly recognized in *Frein* and *Jenkins*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2024