

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM Horry COUNTY  
Court of Common Pleas  
Steven H. John, Circuit Court Judge

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Case No. 2017-CP-26-07411  
(Appellate Case No. 2020-000092)

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Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,  
on Behalf of the 15th Judicial Circuit Drug Enforcement Unit, .....Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars  
(\$20,771.00), U.S. Currency and Travis Green, ..... Respondents.

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**BRIEF OF AMICI THE BUCKEYE INSTITUTE AND  
AMERICANS FOR PROSPERITY FOUNDATION – SOUTH CAROLINA**

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Jeffrey P. Dunlaevy\*  
(SC Bar No. 16978)  
Dunlaevy Law Firm  
37 Villa Road, Suite 440  
Greenville, South Carolina 29615  
Phone: (864) 208-9274  
Email: jeff@dunlaevylaw.com

Robert Alt\*\*  
Jay Carson\*\*  
THE BUCKEYE INSTITUTE  
88 East Broad Street, Suite 1300  
Columbus, Ohio 43215  
Phone: (614) 224-4422  
Email: robert@buckeyeinstitute.org.  
j.carson@buckeyeinstitute.org

\*(Counsel of Record)

\*\**Motions for admission pro hac vice forthcoming*

*Counsel for Amici*

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## I. INTEREST OF AMICI

*Amici* are non-profit organizations dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. *Amici* are leading advocates of criminal justice reform, promoting policies that keep communities safe through fair processes and fair laws that produce just outcomes. *Amici* have a particular interest in this case because the unrestricted use of fines, fees, and civil forfeiture proceedings poses a grave threat to individual liberty and the right to use and enjoy property.

Founded in 1989, The Buckeye Institute is an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute’s Legal Center files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute’s Economic Research Center provides reliable economic research, data analysis, and econometric modeling at the state level.

*Amicus curiae* Americans for Prosperity Foundation is a nonprofit organization that operates a state chapter in South Carolina (“AFPF – SC”). AFPF – SC is committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF – SC is interested in this case because it believes that, among other constitutional infirmities, South Carolina’s civil asset forfeiture scheme, on its face, offends due process by wrongly requiring property owners to prove their innocence to get their property back. AFPF – SC is also concerned by troubling

empirical evidence showing that this forfeiture scheme creates perverse financial incentives for law enforcement to prosecute forfeiture actions against the most vulnerable to fund their operations. AFPF – SC believes that the trial court’s ruling should be affirmed to protect *all* South Carolinians—particularly those with fewer means who are least able to defend their interests in forfeiture proceedings—from this unjust and unconstitutional abuse of government power.

## **II. STATEMENT OF THE CASE**

Amici adopt the Statement of Facts as consented to by the parties and set forth in the Initial Brief of Appellant.

## **III. SUMMARY OF THE ARGUMENT**

The court below correctly held that South Carolina’s forfeiture regime is facially unconstitutional because the incentive system embedded in it creates a “realistic possibility that forfeiture officials’ judgment ‘will be distorted by the prospect of institutional gain.’” Trial Court Order, at 7, quoting *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1151 (D.N.M. 2018). (R. p. 9). This brief marshals the empirical research and analysis of economists and legal scholars over the last quarter century to support the common-sense conclusion that South Carolina’s forfeiture regime, which allows law enforcement agencies to retain 95% of the value received through civil forfeitures, injects impermissible and irrelevant factors into law enforcement decisions. The economic literature also shows that these financial incentives not only drive law enforcement priorities, but that the strategies that law enforcement agencies employ to maximize their revenue disproportionately burden poor and minority communities, and those least able to protect their property rights. As such, South Carolina’s forfeiture statutes cannot be squared with due process requirements imposed by the United States or South Carolina Constitutions.

Accordingly, this Court should affirm the trial court’s order striking down South Carolina’s

forfeiture statutes as unconstitutional on their face.

#### IV. ARGUMENT

When asked why he robbed banks, Willie Sutton famously replied, “Because that’s where the money is.” See *United States v. Cravens*, 275 F.3d 637, 638 (7th Cir. 2001). Sutton’s response rings humorous because his candor reveals his complete amorality. Yet it also resonates because Sutton expresses an economic truth that professional economists and any layman alike understand—financial incentives influence behavior. South Carolina’s forfeiture statutes,<sup>1</sup> which allow police agencies and prosecutors to retain 95% of the value of forfeited property for their own institutional use, create a powerful financial incentive to use the vast power of law enforcement to secure revenue through forfeiture.

As the trial court held, incentives that tempt government officials to set aside the impartiality required to enforce the law are inconsistent with the Due Process requirements of the United States and South Carolina Constitutions. Economic and legal scholars who have studied this issue over the past three decades demonstrate with empirical data that law-enforcement agencies, like Willie Sutton, will focus their efforts “where the money is.” The result is a system where revenue generation—not crime prevention—is the primary driver of law enforcement decisions. Importantly, even when revenue generation and crime prevention are not mutually exclusive, the profit motive exacerbates a significant and growing distrust of law enforcement. With recent protests questioning the integrity and even legitimacy of police departments, eliminating improper financial incentives will safeguard citizens’ due process rights and help to restore trust in law enforcement.

##### A. **Dedicating Forfeiture Proceeds to Police and Prosecutors Creates an Impermissible Financial Incentive That Offends Due Process.**

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<sup>1</sup> For ease of reference the statutes comprising South Carolina’s forfeiture regime, 44-53-520 and 44-53-530, are referred to collectively as the “South Carolina forfeiture statutes” or the “forfeiture regime.”

The trial court correctly held that “Due process does not permit any procedure which would offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance, nice, clear and true between the state and the accused.” Trial Court Order, at 7, *citing Ward v. Village of Monroeville*, 409 U.S. 57 (1972), *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D. N.M 2018). (R. p. 9).

Importantly, the constitutional infirmity in all of the cases cited by the trial court was not that the forfeiture regime violated the due process rights as applied to a particular defendant, but that the statute on its face created incentives that called into doubt the fundamental fairness of any proceedings convened under it. The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This neutrality requirement guarantees that “life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.” *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242 (1980); *see also, Mathews v. Eldridge*, 424 U.S. 319 (1976). At the same time, it preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done” by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

In its simplest iteration, due process demands that “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954). To satisfy this test, the temptations inherent in any law-enforcement regime must be reviewed “under a realistic appraisal of psychological tendencies and human weakness . . . .” *Marshall*, , 446 U.S. at 250–52 (1980) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Here, the empirical data relating to civil forfeiture over the last thirty

years confirms that police agency decisions are guided in significant part by the ability to generate to revenue through civil forfeiture. Further, because victims of civil forfeiture bear the burden of proof at trial and are not afforded a right to counsel, the seizing law enforcement agency essentially acts as prosecutor, judge, and jury in a scheme in which they are financially rewarded as a successful plaintiff. This skewing of incentives and burdens renders South Carolina's scheme unconstitutional.

## **B. Economic Data Shows that Fiscal Incentives Affect Law Enforcement Decisions**

In *Tumey v. Ohio* and *Ward v. Village of Monroeville*, *supra*, the Supreme Court of the United States intuitively recognized that the incentives inherent in civil forfeiture laws influence law enforcement decisions. While this conclusion seems obvious, this Court has the benefit of decades worth of data and economic studies that support it. Beginning in the mid-1990s, economists began conducting empirical studies of civil forfeiture statutes and their effects on law enforcement behavior. These early studies confirmed what common sense predicted: The financial incentives created by allowing law enforcement agencies to keep or share in the forfeiture proceeds led law enforcement to expand their enforcement of laws where they stood to realize forfeiture revenue, even at the expense of enforcing other statutes. See Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture & the War on Drugs: Lessons from Economics & History*, 33 San Diego L. Rev. 79, 93 (1996) (“In sum, economic analysis indicates that civil forfeiture leads to: (1) bigger government; (2) inefficient and overly aggressive enforcement of the drug laws; and (3) increased violence and theft.”).

### **1. Economic Incentives of Civil Forfeiture Drive How Law Enforcement Agencies Deploy Their Resources.**

In their seminal work, *Policing for Profit: The Drug War's Hidden Economic Agenda*, economists Eric Blumenson and Eva Nilsen studied two decades of drug enforcement forfeitures by analyzing Justice Department reports and conducting numerous interviews of law enforcement

officials. Based on their research, Blumenson and Nilsen explained how police shifted their enforcement priorities to maximize forfeiture revenue:

Consider first police investigations. The shift in law enforcement priorities, from crime control to funding raids, is perhaps best revealed by the advent of the “reverse sting,” a now common police tactic that rarely was used before the law began channeling forfeited assets to those who seized them. The reverse sting is an apparently lawful version of police drug dealing in which police pose as dealers and sell drugs to an unwitting buyer. The chief attraction of the reverse sting is that it allows police to seize a buyer’s cash rather than a seller’s drugs (which have no legal value to the seizing agency). According to one reverse-sting participant, “This strategy was preferred by every agency and department with which I was associated because it allowed agents to gauge potential profit before investing a great deal of time and effort. (Reverse stings) occurred so regularly that the term reverse became synonymous with the word deal.

Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 Univ. of Chicago L. Rev. 35, 68-69 (1998) (internal citations omitted).

Blumenson and Nilsen further noted the “the otherwise baffling policy” implemented in New York City and Washington, D.C. of seeking to enforce traffic laws more vigorously based on the direction of the traffic flow. They discovered the reason for this lopsided enforcement in congressional testimony offered by Patrick Murphy, the former Police Commissioner of New York City, who stated that the

Police . . . have a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.

*Id.* at 69 (citing Congressional testimony of former New York City Police Commission, Patrick Murphy).

Law enforcement’s decision to focus on the arteries carrying money rather than those carrying drugs graphically illustrates how financial incentives affect law enforcement decisions. Not surprisingly, in the years since Blumenson & Nilsen first observed the “baffling policy,” journalists and academics identified focused enforcement based upon the direction of money flow in other areas of the country. For example, in a 2016 study on forfeitures, the *Texas Tribune* reported that more

than 80% of the cash seizures made by Webb County law enforcement agencies were made on the southbound lanes I-35 heading into Mexico. Jolie McCullough, Acacia Coronado & Chris Essis, *Texas police can seize money and property with little transparency. So we got the data ourselves*, Tex. Trib., (June 7, 2019), <https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith>. Indeed, according to a Laredo Police Department Spokesman, on the day he was interviewed, Webb County agencies made only two seizures on the northbound lanes of I-35, compared with 16 cash seizures from the southbound lanes. *Id.*

Similarly, *The Atlantic* reported that in Tennessee, where eastbound I-40 “includes vehicles importing drugs from Mexico,” police focus 90% of their efforts on the *westbound* lanes, where cars are “carrying cash back towards Mexico.” Conor Friedersdorf, *Police Ignore Illegal Drugs, Focus on Seizing Cash*, *The Atlantic*, (May 24, 2011) <https://www.theatlantic.com/national/archive/2011/05/police-ignore-illegal-drugs-focus-on-seizing-cash/239349>; *see also* Chris W. Surprenant & Jason Brennan, *Injustice for All: How Financial Incentives Corrupted and Can Fix the US Criminal Justice System*, 101 (2020) (“Instead of trying to seize illegal drugs to prevent them from being distributed, law enforcement officers [on I-40] seemed more interested in seizing the cash connected to their sale to help fund their own operations.”). As Professors Blumenson and Nilsen explained, “The consequence of [targeting lanes carrying money] was that the drugs that would have been purchased continued to circulate freely.” Blumenson & Nilsen, *supra* at 69.

## **2. The Economic Incentives of Civil Forfeiture Impact the Type of Statutes that Law Enforcement Agencies Choose to Enforce.**

In addition to impacting where law enforcement agencies focus their efforts, the economic incentives imbedded in civil forfeiture result in agencies focusing on enforcing certain laws—particularly drug offenses—over others. Police thus direct their attention to non-violent offenses at the expense of other types of crime. Ten years after the Blumenson & Nilson paper, a similar study

conducted by economists at UCLA and the University of California, Irvine examined whether the amount of forfeited property that flowed directly back to the law enforcement agency affected law enforcement behavior. Katherine Baicker and Mireille Jacobson, *Finders Keeper: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. Pub. Econ. 2113 - 36 (2007). The authors found that “when law enforcement agencies get to keep more of the assets they seize, they respond by devoting substantially more of their effort to anti-drug [i.e., more profitable] policing and away from other petty crimes.” *Id.* at 2115. Baicker & Jacobson explained:

The police [ ] seek to maximize some function of their effort, which they dislike, and their budget, which they want to increase (perhaps because they care about the crime reduction their budget finances, because of Leviathan motivation, because their job is more pleasant with greater resources, or because they benefit directly from higher salaries or perks.)

*Id.* at 2117.

Similarly, economists John Worrall and Tomislav Kovandzic at the University of Texas drew on the Law Enforcement Management and Administrative Statistics surveys from 1997 and 2000, which contained data on 1,443 observations drawn from surveys regarding forfeitures provided by law enforcement agencies with over 100 sworn officers. They studied the effect of incentives on law enforcement agency behavior by comparing how often agencies in states with more restrictive state forfeiture statutes partner with the federal government under the federal “Equitable Sharing” forfeiture program (which allows law enforcement agencies to utilize federal preemption to bypass state restrictions including caps on the percentage of funds that law enforcement can receive from a forfeiture) with agencies in states with more permissive forfeiture statutes.<sup>2</sup> *See* 18 U.S.C. § 983. The data unsurprisingly show that “police agencies rationally elect to pursue the most lucrative avenues for asset forfeiture . . . .” John L. Worrall and Tomislav V. Kovandzic, *Is Policing For*

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<sup>2</sup> “Assisted by state law enforcement agencies motivated by this [“Equitable Sharing”] program, the federal government seized over \$5 billion in assets (yes billion, with a “b”) in 2014, a 550% increase over the amount seized in 2004 and 50% more than what was stolen by burglars in the US during the same year.” Suprenant & Brennan, *supra*, at 100.

*Profit?: Answers from Asset Forfeiture*, 7 *Criminology and Pub. Pol’y* 219 (2008). The authors also cited with approval prior studies which suggested that “forfeiture may be clouding the judgment of law-enforcement agencies in the war on drugs,” noting that “more than 60% of police agencies surveyed reported dependence on asset forfeiture or were ‘addicted to the drug war.’” *Id.* at 222 (citing John L. Worrall, *Addicted to the drug war: The role of civil asset forfeiture as a budgetary necessity in contemporary law enforcement*, 29 *Journal of Crim. Justice* 171-187 (2001)).

Most significantly, however, while the Worrall & Kovandzic study was not designed to determine whether asset forfeiture distorts law enforcement goals and could thus not answer that question, it noted that “neither drug arrests nor crime were significant predictors of forfeiture” in any of their models. Worrall & Kovandzic explain that finding’s ramification with chilling understatement, stating “[t]his finding suggests that forfeiture activities may be pursued independent of crime.” *Id.* at 239; *see also* Suprenant & Brennan, *supra*, at 98–99 (discussing particularly egregious example).

This troubling implication seems to be borne out by studies showing that up to 80% of civil forfeitures are not accompanied by a criminal conviction. *See* Blumenson & Nilsen, *supra*, , at 56. This sobering statistic means that in a substantial majority of forfeiture cases studied the law-enforcement agency lacked either the evidence or the will to prosecute any crime.

While a comprehensive look at the substantial body of economic literature on civil forfeitures could fill volumes, it is important to note that studies performed more recently are consistent with those of the mid-1990s. In their recent paper, “To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement,” Michael D. Makowsky, Thomas Stratmann, and Alex Tabarrok examined data from a sample of 36 states “to study the fiscal determinants of arrest patterns, including arrests by race.” Michael D. Makowsky, Thomas Stratmann, and Alex Tabarrok, *To Serve*

*and Collect: The Fiscal and Racial Determinants of Law Enforcement*, No. 16-17 GMU Working Paper in Economics (September 2018). The authors hypothesized that “police departments that can keep seized assets are more likely to make the kinds of arrests that lead to seized assets, especially when department budgets are tight.” *Id.* at 4. They explained their modelling as follows:

Incentives are more important when enforcement effort is a choice. Thus, a revenue-driven model of enforcement predicts that police will focus on crimes that are more responsive to police effort and, of those crimes, those which are more productive of revenue. Our model also predicts that revenue-driven law enforcement will increase when revenue demands become more salient relative to other demands and when revenue control accrues to agents who influence law enforcement choices. In particular, we predict that revenue-driven law enforcement will increase when municipalities run deficits. \*\*\* Holding deficits constant, we expect departments that can retain revenues to engage in more revenue driven policing.

*Id.* at 6.

The data supported their hypothesis. Specifically, the authors found that “drug arrests increase in counties where local governments are running deficits, but only in states that allow police departments to retain seizure revenue.” *Id.* at 15. The data showed that “optimal deterrence is not the sole criteria for arrests, and that police officer behavior is influenced by local fiscal conditions.” *Id.* at 17. Thus, law-enforcement agencies incentivized by permissive forfeiture laws will—like Willie Sutton—focus their efforts according to where the money is.

### **3. The Economic Incentives of Civil Forfeiture Incentivize Law Enforcement to Focus Stops and Seizures on the Poor and Minorities.**

While evidence that police change their law-enforcement behavior in response to institutional financial incentives would be enough to disqualify South Carolina’s forfeiture regime, studies further show that the economics of civil forfeiture encourage law-enforcement agencies to focus their efforts on poor and minority communities where forfeiture victims often lack the resources to contest the forfeiture. This is terrible public policy and contributes to the frayed relationship between police and minority communities. For example, the Justice Department’s report on policing in Ferguson,

Missouri highlighted how the need to generate revenue resulted in over-policing and distrust of the police:

The City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved. \* \* \*

The importance of focusing on revenue generation is communicated to [Ferguson Police Department (FPD)] officers. Ferguson police officers from all ranks told us that revenue generation is stressed heavily within the police department, and that the message comes from City leadership. The evidence we reviewed supports this perception.

U.S. Dep't of Justice Civil Rights Div., *Investigation of the Ferguson Police Department*, (March 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf), at 1-2.

The report further noted how financial incentives warped policing priorities and drove arrests in minority communities:

The City's emphasis on revenue generation has a profound effect on FPD's approach to law enforcement. Patrol assignments and schedules are geared toward aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation. Officer evaluations and promotions depend to an inordinate degree on "productivity," meaning the number of citations issued. Partly as a consequence of City and FPD priorities, many officers appear to see some residents, especially those who live in Ferguson's predominantly African American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue. This culture within FPD influences officer activities in all areas of policing, beyond just ticketing.

*Id.* at 2.

While the Ferguson report focused more on fines and fees than forfeitures, the report demonstrates the invidious results that occur when police are driven by a need to raise revenue rather than a legitimate law enforcement motive.

Indeed, Makowsky, Stratmann, and Tabarrok found the same disproportionate effect of revenue driven policing on minorities. Their research demonstrated that in counties facing deficits, increases in drug arrests were "only observed for black and Hispanic drug arrests; white drug arrests

remain unchanged.” Markowsky, Stratman & Tabarrok, *supra*, at 15. Their study also found that “both black and Hispanic DUI arrest rates are increasing with deficits and seizure laws, while white DUI arrests are not.” *Id.* at 16. Markowsky, Stratmann and Tabarrok further reported that “the seizure of non-narcotic property from black and Hispanic arrestees is increasing with [the] size of the deficit in states where police departments can retain revenue from seized property.” *Id.*

Likewise, a 2017 study conducted by *Reason Magazine*, Lucy Parson Labs, and *The Chicago Tribune* demonstrated that forfeitures were clustered in poorer neighborhoods. Even more striking is that these seizures were not headline-making major drug busts, but typically cars and cash of low value. The average estimated value of a seizure in the Chicago study was \$4,553, while the median value was \$1,049. Nearly 75% of all of these seizures were cash. C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, Reason, (June 13, 2017) <https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset/>. Similarly, an ACLU analysis of forfeitures in Philadelphia between 2011 and 2013 revealed that half of the forfeiture cases involved less than \$192. Scott Kelly, *Guilty Property: How Law Enforcement Takes \$1 million in Cash from Innocent Philadelphians Every Year—and Gets Away with It*. Philadelphia, PA: American Civil Liberties Union of Pennsylvania (2015).

Because law enforcement seeks to capitalize on a high volume of small seizures, “[t]he financial motivations behind forfeiture actions have the potential to disproportionately impact lower income parties. This is because one way for law enforcement agencies to generate profits is to target low-income parties who are financially incapable of challenging seizures.” Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure & Its Impact on Indigent Property Owners*, 35 B.C.J.L. & Soc. Just. 257, 274–77 (2015). The incapability or economic inefficiency of challenging small seizures is exacerbated by the fact that individuals whose property has been seized

have no Fourth Amendment right to counsel because the civil asset forfeiture is accomplished through a civil in rem proceeding rather than a criminal action. With no right to counsel, there is a strong economic disincentive to challenge the relatively small dollar seizures documented by Ciaramella and Crawford. This economic reality is sadly consistent with Justice Thomas' recent observation that "forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings." *Leonard v. Texas*, 137 S.Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari) (citing Sallah, O'Harrow, & Rich, *Stop and Seize*, Wash. Post, A1, A10, (Sept. 7, 2014)) . Ironically, while Willie Sutton focused his efforts on a few well-protected banks, law-enforcement officials seem to focus theirs on volume.

## V. CONCLUSION

The doctrine of in rem civil forfeiture as embodied in South Carolina's statutes is a Frankenstein's monster pieced together from prehistoric ritual, discarded feudal notions, and "hoary legal fictions" created for the economic necessities of a time long passed. *See Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (Stevens, J., dissenting); *see also, In Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-686 (1974) (detailing the historical development of civil forfeiture law from the "Biblical and pre-Judeo-Christian practices" of deodand, through English common law, and statutes designed to combat piracy on the high-seas); *see also, Paul Schiff Berman, An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 Yale J.L.& Human. Vol. 11, 1 (1999). It has survived into modernity by inertia. And like Dr. Frankenstein's creation, when viewed from a distance, the bolts and seams holding it together are not apparent. In *Leonard v. Texas*, Justice Thomas hinted that eventually, courts will need to face the monster head on, and determine whether the poorly assembled doctrine of a bygone era can lumber into the 21<sup>st</sup> century. *See Leonard*, 137 S. Ct. at 850 (Thomas, J., statement respecting

denial of certiorari) (“Whether this Court’s treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail.”).

The consideration that Justice Thomas suggests to determine whether the broad, modern forfeiture practice is justified requires looking at how incentives embedded in statutes like South Carolina’s have operated in the real world. As Justice Holmes observed, “Experience is the life-blood of the law.” Holmes, *The Common Law* 1 (1881). Here, that experience is reflected in the empirical findings collected by economists over the last three decades showing that law-enforcement agencies bend their priorities to chase revenue, and that this comes at the expense of the society’s most vulnerable. This distortion fails the most basic demand of due process, namely that “justice must satisfy the appearance of justice,” *Offutt*, 348 U.S. at 14. For all the foregoing reasons, the trial court’s decision should be affirmed.

Date: October 23, 2020

Respectfully submitted,

s/ Jeffrey P. Dunlaevy

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Jeffrey P. Dunlaevy (SC Bar No. 16978)\*

Dunlaevy Law Firm

37 Villa Road, Suite 440

Greenville, South Carolina 29615

Phone: (864) 208-9274

Email: [jeff@dunlaevylaw.com](mailto:jeff@dunlaevylaw.com)

\*(Counsel of Record)

Robert Alt\*\*

Jay Carson\*\*

THE BUCKEYE INSTITUTE

88 East Broad Street, Suite 1300

Columbus, Ohio 43215

Phone: (614) 224-4422

Email: [robert@buckeyeinstitute.org](mailto:robert@buckeyeinstitute.org).

[j.carson@buckeyeinstitute.org](mailto:j.carson@buckeyeinstitute.org)

\*\**Motions for admission pro hac vice forthcoming*

*Counsel for Amici*

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM Horry County  
Court of Common Pleas  
Steven H. John, Circuit Court Judge

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Case No. 2017-CP-26-07411  
(Appellate Case No. 2020-000092)

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Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit,  
on Behalf of the 15th Judicial Circuit Drug Enforcement Unit, .....Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars  
(\$20,771.00), U.S. Currency and Travis Green, ..... Respondents.

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**PROOF OF SERVICE**

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I hereby certify that on this October 23, 2020, I electronically filed the forgoing *Brief of Amici, Unopposed Motion for Leave to File Amici Curiae Brief, and Memorandum in Support of Unopposed Motion for Leave to File Amici Curiae Brief* with the South Carolina Supreme Court via email and I served a copy via email on the following counsel.

Parties:

James R. Battle  
S.C. Bar No. 73604  
BATTLE LAW FIRM, LLC  
PO Box 530  
Conway, SC 29528  
[jbattle@battlelawsc.com](mailto:jbattle@battlelawsc.com)

Alex Hyman, Esq.  
Hyman Law Group  
1208 Third Avenue  
Conway, SC 29526  
[alex@hymanlaw.group](mailto:alex@hymanlaw.group)

Amici:

Daniel Alban  
[dalban@ij.org](mailto:dalban@ij.org)

Robert Frommer  
[rfrommer@ij.org](mailto:rfrommer@ij.org)

Laura C. Tesh  
[lauratesh@scag.gov](mailto:lauratesh@scag.gov)

Susan K. Dunn  
[sdunn@aclusc.org](mailto:sdunn@aclusc.org)

Shirene C. Hansotia  
[shansotia@aclusc.org](mailto:shansotia@aclusc.org)

Jeremiah Williams  
[Jeremiah.Williams@ropesgray.com](mailto:Jeremiah.Williams@ropesgray.com)

Jonathan Ference-Burke  
[Jonathan.Ference-Burke@ropesgray.com](mailto:Jonathan.Ference-Burke@ropesgray.com)

Caitlin E. Giaimo  
[Caitlin.Giaimo@ropesgray.com](mailto:Caitlin.Giaimo@ropesgray.com)

Amreeta S. Mathai  
[amathai@aclu.org](mailto:amathai@aclu.org)

Olga Akselrod  
[oakselrod@aclu.org](mailto:oakselrod@aclu.org)

Rodkangyil O. Danjuma  
[odanjuma@aclu.org](mailto:odanjuma@aclu.org)

Leah Watson  
[lwatson@aclu.org](mailto:lwatson@aclu.org)

Date: October 23, 2020

Respectfully submitted,

s/ Jeffrey P. Dunlaevy

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Jeffrey P. Dunlaevy (SC Bar No. 16978)\*

Dunlaevy Law Firm

37 Villa Road, Suite 440

Greenville, South Carolina 29615

Phone: (864) 208-9274

Email: [jeff@dunlaevylaw.com](mailto:jeff@dunlaevylaw.com)

\*(Counsel of Record)