No. 00-6567

IN THE

Supreme Court of the United States

LARRY DEAN DUSENBERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

ALLISON M. ZIEVE
Counsel of Record
ALAN B. MORRISON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner
Larry Dean Dusenbery

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INTRODUCTION

Petitioner's opening brief explains why, under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Government's attempt to provide notice of the forfeiture of his property did not satisfy due process. Where, as here, the Government knows exactly where the property owner is located and controls the owner's physical location, and where the Government could without undue burden ensure receipt of the notice, the balance of factors that guide due process analysis requires the Government to provide actual notice. Therefore, when challenged, the Government must show that the property owner actually received the notice.

Petitioner and the Government agree that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane*, 339 U.S. at 314. The parties' disagreement turns on how to apply that standard to forfeitures of federal inmates' property. Petitioner looks to the Court's due process jurisprudence, which recognizes the need to balance the risk of wrongful deprivation of property and the likely value of additional procedural protections, on the one hand, against the Government's interest, including the burdens imposed by providing the additional procedures, on the other. The Government does not dispute that better notice than that provided to Petitioner is feasible and not unduly burdensome. In fact, the Government repeatedly uses the Bureau of Prisons' *current* procedures for handling inmate mail, under which it could prove receipt of a notice mailed to and received by a federal inmate today, to demonstrate why notice mailed to an inmate satisfies due process. The current procedures, of course, were not used when the Government forfeited Petitioner's property.

In the Government's view, although notice must be "reasonably calculated" to inform property owners of forfeiture proceedings, that general guideline does not incorporate a balancing of considerations. Rather, the Government suggests, notice mailed to a person's current address is always "reasonably calculated, under all the circumstances" to apprise interested parties of potential deprivations of property, whatever the circumstances might be. In other words, according to the Government, mailed notice is always adequate notice. The Court has never previously endorsed this per se rule, and it should not do so here.

ARGUMENT

I. DUE PROCESS REQUIRES THE GOVERNMENT TO ENSURE ACTUAL DELIVERY OF NOTICE BEFORE IT CAN FORFEIT AN INMATE'S PROPERTY.

The Government's brief is based on *Mullane's* holding that due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. At the same time, the brief fails to pay more than lip service to the circumstances presented here. Although this Court has recognized that the circumstances of inmates differ from those of free individuals in significant ways, *see, e.g.*, *Houston v. Lack*, 487 U.S. 266 (1988) (circumstances justify deeming inmates' pro se notice of appeal mailed when delivered to prison mail room); *Wolff v. McDonnell*, 418 U.S. 539, 568-69 (1974) (circumstances justify rule against inmates confronting and cross-examining witnesses at disciplinary hearings), the Government dismisses those differences out of hand.

A. The Circumstances Of Inmates Differ From Those Of Non-Inmates In Ways Material To The Due Process Analysis.

The Government sidesteps the circumstances presented here by labeling as "policy arguments" the facts that it knows where federal inmates can be found at all times and even controls their physical location. Resp. Br. 32. In its view, these facts warrant mailed notice but no more. What the Government refuses to take into account, however, is that it not only knows each inmate's current address, it also owns the facility where the inmate is housed, operates it, controls its employees, and has full access to both the facility and the people who reside there. The Government's only response to these facts is the conclusory statement that "[t]here is no reason why" they should require it to prove receipt of notice. Resp. Br. 33. In fact, there is a very important reason why the Government's control over where the inmate is at any particular moment of every day affects the notice requirement here: Those circumstances guarantee that the Government can deliver a notice to an inmate and obtain proof of receipt, which is not true of the circumstances of non-inmates.

In addition, property owners who are not incarcerated can generally monitor their property and in that way protect their property rights. For example, an owner can see that the car is in the driveway each morning. Inmates cannot do so; they do not have access to most of their property. Moreover, most property owners receive mail directly from the postal service. Inmates do not; they receive mail only through prison staff. The extra hands through which the mail passes increase the potential for non-delivery, for example, through inadvertence, incompetence, or ill-will between a guard and an inmate. Indeed, once the mailed notice reaches the prison, it leaves the postal system and enters the prison system—a

system that directly benefits from forfeitures. *See* Amicus Br. of DKT Liberty Project at 10 n.2 (prison construction is major component of spending from Asset Forfeiture Fund). This case is thus not analogous to the cases involving mail sent to a home or business. In those cases, the notice is delivered by a disinterested mail carrier directly to an address over which the addressee exercises dominion or control. In contrast, Petitioner had no control over the prison mailroom or the people who operated it.

The Government deems it "anomalous" to require that it ensure receipt by inmates when proof of receipt is not required with regard to notices sent to non-inmates. Resp. Br. 34. This Court has repeatedly explained, however, that the requirements of due process are flexible; they vary based on "all the circumstances." *See, e.g., Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) ("very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"); *Mullane*, 339 U.S. at 313 (procedures must be "appropriate to the nature of the case"). Again, inmates' circumstances are different from those of the free individuals and companies in the cases on which the Government relies. *See also Helling v. McKinney*, 509 U.S. 25, 32 (1993) (Constitution imposes on government special duties with respect to people in its custody against their will) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). Indeed, changing the circumstances of living is much of the point of prison. This case would not be the first in which the Court has recognized that different circumstances require different processes. *See, e.g., Greene v. Lindsey*, 456 U.S. 444, 453 (1982) (posting notices on doors would satisfy due process in many cases but did not "in the circumstances of this case"); *Covey v. Town of Somers*, 351 U.S. 141 (1956) (in foreclosure action, notice by mailing,

posting, and publication inadequate where interested party was incompetent); *Mullane*, 339 U.S. at 318 (newspaper notice adequate for beneficiaries whose addresses unknown to trustee; notice by personal service or mail required for beneficiaries whose addresses known).

In short, the Government's approach reads "under all the circumstances" out of *Mullane* and undermines the flexibility at the core of this Court's due process jurisprudence.

B. The Analysis In *Mullane* Embodies The Three Prongs Of *Mathews v. Eldridge*.

Because it refuses to recognize a framework for evaluating *Mullane*'s phrase "reasonably calculated, under all the circumstances," the Government is reduced to arguing in conclusory fashion that the procedures in place when the Government forfeited Petitioner's property were reasonably calculated to provide notice, even if those procedures were not successful. *Mullane*, however, offers further guidance. *Mullane* took into account the fact that the property at issue was "a large number of small interests," 339 U.S. at 319, the practical difficulties and costs of ensuring notice to all beneficiaries, *id.* at 317-18, and the fact that notice received by most of the beneficiaries interested in objecting to the accounting would protect the interests of all, as the beneficiaries shared a common interest. *Id.* at 319. These points reflect the three factors later set forth by the Court in *Mathews v. Eldridge*: the private interest, the risk of error and probable value of additional or different procedures, and the burdens imposed by the additional procedures. 424 U.S. at 335. In essence, the *Mathews* test is a distillation of the concerns identified in *Mullane*. As noted above, the Government's contrary view can be supported only by reading "reasonably calculated" in isolation from the rest of the *Mullane* opinion.

The Government questions the applicability of the *Mathews* test to this due process challenge. Stating summarily that the *Mathews* test is "more general" than the *Mullane* standard, Resp. Br. 27, the Government urges this Court not to apply *Mathews*. However, although this Court has not stated expressly that the *Mathews* test applies to all due process challenges, it has consistently applied the concerns identified in *Mathews* when considering such questions. For instance, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Court looked to both the mortgagee's "substantial property interest," *id.* at 798, and the degree of effort needed to ascertain the mortgagee's address, *id.* at 798 & n.4, to conclude that the mortgagee was entitled to receive mailed notice or personal service of notice of a tax sale. In *Greene v. Lindsey,* in which the Court considered the adequacy of eviction notices posted on apartment doors, the residents' interest in continued tenancy in their homes (private interest at stake), 456 U.S. at 450-51, the evidence that children tore the eviction notices off the apartment doors (risk of erroneous deprivation), *id.* at 453-54, and the effect of mailing notices to tenants at the apartment addresses (value and burden of additional procedures), *id.* at 455, all played a role in the Court's decision that posted notices had to be supplemented by mailed notices. And in *Schroeder v. City of New York*, 371 U.S. 208 (1962), the Court cited the small chance that the property owner would see the published and posted notices of condemnation proceedings (the likelihood of erroneous deprivation), *id.* at 212, and the fact that the city knew the owner's name and address (the minimal burden on the city of mailing notice), *id* at 210, 213, in holding that the notices did not satisfy due process.[1]

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[1] The Government cites *Medina v. California*, 505 U.S. 437, 443 (1992), for the proposition that *Mathews* does not apply to

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Admittedly, *Mathews* addressed the right to a pre-termination hearing; and the Court generally cites *Mullane*, rather than *Mathews*, when addressing the constitutional adequacy of notice. Nonetheless, the Due Process Clause, which is the source of both the notice and the hearing requirements, suggests no reason to distinguish hearing from notice for purposes of analyzing the adequacy of the process afforded. Indeed, to make such a distinction between notice and hearing would be illogical since, without adequate notice, the right to a hearing is meaningless. *See also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (*Mathews* test used to assess need for predeprivation notice and hearing); *Lepelletier v. FDIC*, 164 F.3d 37, 45-46 (D.C. Cir. 1999) (*Mathews* test used to assess adequacy of notice); *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) (same).

C. Under *Mullane* And *Mathews*, The Government Failed To Provide Adequate Notice To Petitioner Before Forfeiting His Property.

Turning to the *Mathews* test, the Government agrees that the private interest at stake—$21,939—is significant. Resp. Br. 27; *see also* Amicus Br. of DKT Liberty Project at 3

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[1](...continued)
all due process challenges. In fact, although *Medina* held that *Mathews* does not provide the appropriate framework for resolving challenges to rules that are part of the criminal process, it acknowledged that *Mathews* provides the general approach for resolving due process claims in civil proceedings. *Id.* at 444. Here, of course, the proceedings are civil, and *Medina* is inapposite. *See United States v. Ursery*, 518 U.S. 267 (1996).

(DOJ Asset Forfeiture Fund had balance of $647.5 million in 1998). As to the second factor, however, it disagrees that the procedures in place at the time it forfeited Petitioner's property posed a significant risk of erroneous deprivation and, therefore, sees little value in additional or different procedures. Resp. Br. 28. To address this consideration, the Government simply cites to the portion of its brief that purports to explain why its procedures for sending forfeiture notices to inmates are "reasonably calculated" to reach them. *Id.* (citing Resp. Br. 21-25). (In this way, the Government implicitly recognizes that *Mullane* and *Mathews* are based on similar considerations.) By reference to its earlier discussion, the Government's argument on this point has two parts. First, the Government says that its *current* procedures are sufficiently reliable. Resp. Br. 24. However, even if the procedures today are constitutionally adequate, Petitioner did not have the benefit of them; his property was forfeited in 1988.

Second, contrary to the Government's suggestion, Resp. Br. 29, Petitioner is not asking the Court to formulate prison mail policy. The question here is whether the Government must ensure successful delivery of forfeiture notices to federal inmates. If the answer to that question is yes, and if the mails and Bureau of Prison procedures for handling inmate mail meet that requirement, the procedures are adequate. If they are not, the Government—not this Court—must devise an alternate means of delivery. Again, given the Government's control over its own prisons and the location of inmates at all times of the day and night, it could certainly ensure that an inmate received a notice if it wanted to do so.

Third, the Government faults Petitioner for not offering evidence of a systemic problem. Resp. Br. 23. Petitioner offered evidence that he did not receive the notice sent to him and has cited numerous reported decisions presenting similar

circumstances. JA 45; Pet. Br. 14-15. Although the Government now questions the truthfulness of Petitioner's testimony, Resp. Br. 21, in the courts below it did not contest Petitioner's statement. Likewise, the decisions cited by Petitioner accept that the inmates did not receive the notices at issue. The Government's suggestion that this case and others may arise from inmates' false claims, Resp. Br. 23, is both self-serving and untimely.

Tellingly, the Government has no suggestion as to how an inmate would gather systemic evidence that mail delivery was unreliable, much less how Petitioner in 1993 (when he filed his motion for return of property) would have gathered evidence pertaining to delivery in 1988 (when the Government mailed the forfeiture notice). The problem with undelivered mail is that the addressee does not know that it has been sent, let alone that it has not been delivered. Furthermore, any such evidence would be in the Government's control, not in the control of a pro se inmate. The fact that the Government has made changes to its procedures for handling inmate mail since the time it forfeited Petitioner's property, *see* Resp. Br. 24 n.14, 29, suggests that it recognized a problem with the procedures in place at that time.

Addressing the third *Mathews* prong, the Government's brief contradicts itself. The Government argues that requiring it to obtain proof of receipt of notice, and thereby to ensure that actual notice was provided, would "subject[] the government to significant and unnecessary fiscal, administrative, and security burdens." Resp. Br. 28. Then, without stopping to explain why ensuring delivery of forfeiture notices would be so burdensome, the Government turns to a discussion of the procedures currently in place (but not in place when the Government forfeited Petitioner's property) to handle forfeiture notices sent to inmates by certified mail. The Government explains that,

today, a prison employee signs a log book to document both receipt and distribution of certified mail; the inmate-addressee also signs a log book to verify delivery, and forfeiture notices are opened in the presence of the inmate. Resp. Br. 24, 29 n.19. The prison retains the log books for 30 years. Resp. Br. 24 n.14. Thus, if delivery is successful, the current practices result in proof of actual delivery—the inmate's signature—and satisfy due process. Moreover, they negate any concerns that proof may be unavailable, Resp. Br. 22 n.13, 31, that staff memories of specific deliveries will necessarily fade, Resp. Br. 22 n.13, or that inmates will make false claims of non-delivery. Resp. Br. 23. In this way, the current practices set forth by the Government refute the claim of burden.

Petitioner's concern is not that the Government employ a particular means of providing notice, but rather that the means employed be successful. Thus, the Government's current procedures are adequate if they are successful; and, if they are successful, they will result in verification of delivery. But when they are not successful, the circumstances require—due process requires—that the Government try again, by a subsequent mailing or other means. In the case of Petitioner, the means used were not successful. Thus, due process was not satisfied.[2]

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[2] The Government suggests that its failure to ensure that Petitioner received a forfeiture notice is supported by Federal Rule of Civil Procedure 4(e), which allows a plaintiff to serve a summons and complaint by leaving copies at the defendant's "dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." As the Government states, Petitioner has not challenged the constitutionality of that Rule—which would pose a

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II. BECAUSE THE GOVERNMENT FAILED TO PROVIDE ACTUAL NOTICE, THE FORFEITURE IS VOID.

Petitioner has argued that, as held by the majority of circuit courts to have addressed the issue, a forfeiture effected without adequate notice is void. Therefore, if the statute of limitations on initiating a forfeiture has run, the Government must return the property it has taken without due process. The Government questions whether the issue is before the Court and challenges Petitioner's argument on its merits. The Government is incorrect on both counts.

A. First, Petitioner disagrees that this issue is not fairly included in the question presented. Because the issue will necessarily arise if the Court holds that Petitioner was not provided adequate notice, to hold that the forfeiture notice was inadequate without deciding the consequence of that holding would effectively be to leave the issue before the Court only half decided. Moreover, because the petition was filed pro se, it is appropriate to take a broader view of the question presented. *Cf. Pollard v. United States*, 352 U.S. 354, 359 (1957) (Court considered issue raised for first time in merits brief but noted that it might not have done so had petitioner been represented by counsel prior to merits stage). And because the Government's brief addresses the purely legal issue

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[2](...continued)
constitutional question not encompassed within the question presented in the Petition. In any event, to Petitioner's knowledge, that Rule has never been used to allow a plaintiff to effect service on an inmate-defendant by leaving copies of a summons and complaint with a prison guard, which is the only conceivable analogy to the situation presented here.

on the merits, the Court's consideration of it would not prejudice the Government.

Second, both the district court and the Sixth Circuit below effectively addressed this issue in the context of considering the fate of Petitioner's other forfeited property (his car and personal items). *See* Pet. Br. 7-8. Putting the cart before the horse, both courts held that, despite constitutionally inadequate notice, the forfeiture would stand because the property was traceable to drug proceeds. *See* JA 65, 71. In another case involving this Petitioner, cited by the Government, Resp. Br. 35, the Sixth Circuit held that inadequate notice renders a forfeiture voidable but not void. *See United States v. Dusenbery*, 201 F.3d 763 (6th Cir. 2000). The Sixth Circuit is thus in conflict with the majority of other circuit courts. *See* Pet. Br. 26. Accordingly, to send this case matter back to the Sixth Circuit to consider the issue with respect to Petitioner's $21,939 would be, respectfully, a waste of time. *Cf. Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("interests of judicial administration" served by addressing issue included in petition and briefed by the parties but not presented below).

Third, the Government argues that there is no "continuing need" to address this issue because Congress has prospectively resolved it in the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000). Resp. Br. 37. That statute provides that if a claimant successfully challenges a forfeiture for lack of notice, the Government may commence a new forfeiture action "[n]otwithstanding the expiration of any applicable statute of limitations." 18 U.S.C. § 983(e)(2)(A). This statute does not resolve the issue in this case, as it is applicable only to forfeitures commenced on or after August 23, 2000. *Id.* § 983 note. Indeed, as suggested in the opening brief, Pet. Br. 28, the statute is noteworthy here primarily because it reveals Congress's view on the merits of

the statute of limitations issue: It shows that Congress recognized that the Government's ability to forfeit inmates' assets was threatened when the Government failed to provide adequate notice and that Congress did not assume that equitable tolling was available to the Government in that circumstance.

B. On the merits, the Government's first point is that defective notice does not void a forfeiture. It offers no argument on this point, but instead cites to three circuit court cases. Two of the cases make no mention of a statute of limitations issue. *See Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998); *Boero v. DEA*, 111 F.3d 301 (2d Cir. 1997). The third, *United States v. Dusenbery*, 201 F.3d at 768, does take a view contrary to Petitioner's. It is also the only circuit court to make that explicit ruling. *See* Pet. Br. 26.

The Government next suggests that, even if the statute of limitations has run, it should be able to present "possible defenses" to a finding that the prior proceeding is void. Its only indication of what such a defense might look like in this case is contained in a footnote suggesting that equitable tolling is appropriate because it tried to give notice by "mail[ing] notices to petitioner at three different locations and publish[ing] notice in the newspaper." Resp. Br. 37 n.21. To begin with, as discussed in Petitioner's opening brief, equitable tolling does not apply here. Pet. Br. 27-28; *see also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (equitable tolling applied "sparingly").

In any event, neither the "mere gesture," *Mullane*, 339 U.S. at 315, of notice published in an Ohio newspaper, when the Government knew that Petitioner was incarcerated in Michigan, nor the notice sent to Petitioner's home address, when the Government knew that he was in a federal prison, can help the Government here. The patent inadequacy of both

forms of notice should have been clear to the Government when it used them in Petitioner's case. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972).

As for the notice mailed to the prison, if the Court reaches the question of whether the forfeiture is void, it necessarily will have decided that the notice did not satisfy due process because the Government without undue burden could have and should have done more. The Government certainly could have sought to verify receipt of the notice prior to taking Petitioner's property. It had the means of doing so; in fact, when service is successful, it does so now. Resp. Br. 24. Yet it chose to proceed without knowing whether Petitioner had received the notice. Nonetheless, the Government states that it "actively pursued its rights through the administrative forfeiture process Congress established by statute in 19 U.S.C. 1607(a)." Resp. Br. 37 n.21. To the extent the Government is suggesting that its failure to provide notice should be excused because it was following a statutory procedure, that suggestion should be rejected. The statute does not address the means of providing notice (and, even if it did, could not override the Constitution). In addition, whereas the Government may have "actively pursued its rights," it did not actively provide due process. In such circumstances, equitable tolling should not apply.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner's opening brief, the decision of the Sixth Circuit should be reversed and the case remanded with instructions that the forfeiture is void.

Respectfully submitted,

Allison M. Zieve
Counsel of Record
Alan B. Morrison
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner
Larry Dean Dusenbery

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