

**IN THE SUPREME COURT OF ALABAMA**

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**APPEAL NO. 1200562**

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**YAML ALEXSANDER HARE and JOSE SOSA,**  
**Appellants**

**v.**

**SHERIFF HOSS MACK, STACY McELROY and**  
**CITY OF GULF SHORES, ALABAMA,**  
**Appellees**

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**ON APPEAL FROM THE CIRCUIT COURT OF**  
**BALDWIN COUNTY, ALABAMA**  
**CASE NO. CV-2021-900130**

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**BRIEF OF APPELLEES**  
**CITY OF GULF SHORES, ALABAMA AND STACY McELROY**

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**NO ORAL ARGUMENT REQUESTED**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument is not requested by the Appellees, City of Gulf Shores, Alabama and Stacy McElroy. The facts and legal arguments are adequately presented in the briefs and record, and the decision-making process would not be significantly aided by oral argument.

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## **STATEMENT OF THE CASE**

On February 4, 2021, Plaintiffs Yamil Alexander Hale and Jose Sosa filed a Motion for Return of Money and Personal Property in the Circuit Court of Baldwin County, Alabama. (C. 5). Named as Defendants in the Complaint were Officer Stacy McElroy, individually and in his official capacity, the City of Gulf Shores, and the Baldwin County Sheriff's Office<sup>1</sup>. The Complaint sought the return of \$100,000 in cash as well as three (3) cellular phones that were seized during the course of Yamil Hare's November 3, 2020 arrest. The Plaintiffs alleged that they were deprived of their property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section VI of the Alabama Constitution. (C. 6). Plaintiffs alleged that the money was in the custody of the State of Alabama or its agents. (C. 6).

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<sup>1</sup> On March 22, 2021, Plaintiffs filed their "Memorandum in Opposition to Defendants Motion to Dismiss". (C. 44). Attached as Exhibit B to the Memorandum was a First Amended Complaint for Return of Money and Personal Property. (C. 56). That Complaint added Huey "Hoss" Mack to the style of the case and named him in Paragraph 1 of the Complaint. Defendants' Motions to Dismiss were subsequently granted by the Court.

On March 11, 2021, Defendant Baldwin County Sherriff's Office filed a Motion to Dismiss. (C. 12). Two (2) primary arguments were asserted: 1) The Baldwin County Sheriff's Office was not a legal entity subject to suit; and 2) The Court lacked in rem jurisdiction over the Personal Property. The Affidavit of Chief Deputy Anthony Lowery was attached as an exhibit to the Motion. (C. 20).

On March 19, 2021, Defendants Officer Stacy McElroy and the City of Gulf Shores also filed a Motion to Dismiss. (C. 33). The Motion was filed based on fact that the property sought was in the custody of federal agents and thus the Court lacked in rem jurisdiction over the property sought to be returned. The Plaintiffs filed responses to both motions, claiming that jurisdiction was vested in the state court. (C. 44, 60). The Baldwin County Sheriff's Office submitted a Reply brief. (C. 79). On March 30, 2021, the Circuit Court entered Orders granting the Motions to Dismiss filed by the Baldwin County Sheriff's Office, Sheriff Huey Mack, the City of Gulf Shores and Officer Stacy McElroy. (C. 100, 101). A Motion to Alter, Amend or Vacate was then filed by the Plaintiffs. (C. 103). The Defendants filed Responses to that Motion. (C. 115, 122). A Reply brief was filed by the Plaintiff. (C. 131). On May 8,

2021, the Court entered an Order denying Plaintiffs' Motion to Alter, Amend or Vacate and the Plaintiffs appealed that decision. (C. 131, 132).



## **STATEMENT OF THE ISSUES**

- I. Did the trial court err in dismissing the Plaintiffs' Complaint for lack of in rem jurisdiction?

## **STATEMENT OF THE FACTS**

Officer Stacy McElroy is a certified Peace Officer through the Alabama Peace Officers' Standards and Training Commission. (C. 33). He is employed by the City of Gulf Shores Police Department and assigned to the Baldwin County Sheriff's Office's Special Operations Unit. (C. 76). He serves as a K-9 handler utilizing a single purpose narcotics detector Labrador Retriever. (C. 76). Officer McElroy has extensive training in criminal interdiction through the Drug Interdiction Assistance Program, National Criminal Enforcement Association, Motor Vehicle Criminal Interdiction, Regional Counterdrug Training Academy and other private companies dedicated to teaching criminal patrol techniques. (C. 76). Officer McElroy is a certified Master Interdictor with the National Criminal Enforcement Association. (C. 76).

On November 3, 2020, Officer McElroy was parked on the median of I-10 near the 55 mile marker in a semi-marked police vehicle. (C. 76). He observed a vehicle with a Texas paper registration travel east past his location. (C. 76). Due to his training and experience, he knew that paper tags could be fraudulently manufactured. (C. 76). He pulled out

onto eastbound I-10 and caught up with the vehicle. (C. 76). The tag was flopping in the wind and not plainly visible. Officer McElroy observed that he himself was traveling 72 miles per hour and the truck was pulling away from him. (C. 76). The vehicle continued to create distance between itself and Officer McElroy, so Officer McElroy activated his emergency lights. (C. 76). He conducted a traffic stop on the vehicle for Improper Display of Registration under Ala. Code §32-6-51 and Speeding under Ala. Code. §32-5A-171. (C. 76).

Officer McElroy approached the vehicle on the right side and smelled a strong odor of marijuana emitting from the vehicle. (C. 77). He then requested the driver's license. (C. 77). The driver provided Officer McElroy with a Texas license that identified him as Yamil Alexander Hare. (C. 77). Officer McElroy asked Hare where he was going and Hare responded that he was going to Disney World in Orlando. Officer McElroy observed no luggage in the vehicle. (C. 77). He called Task Force Officer Mike Smith for backup. (C. 77).

Hare was unable to provide the name of the hotel where he was staying in Orlando and stated that he did not know whether Disney

World was open. (C. 77). Hare then represented that he had purchased his tickets for Disney World and then retracted the statement. (C. 77).

Hare's license was returned as invalid. (C. 77). Officer McElroy advised Hare that he could not smoke marijuana in his vehicle. McElroy then asked if there was anything else in the vehicle other than marijuana. (C. 77). Hare stated that there was only one gram of marijuana in the car. Officer McElroy then advised Hare that he was going to search the vehicle. (C. 77).

Officer McElroy located a plastic baggie containing a small amount of marijuana in the center console. (C. 77). Also in the console were two (2) individually rubber banded bundles of U.S. currency and two (2) cell phones. (C. 77). Officer McElroy then conducted a search of Hare's person where another cellular phone was located. Officer Smith then secured Hare in the rear of his police vehicle. Officer Smith assisted with the search of the vehicle. (C. 77). Officer Smith located a receipt from the Florida Turnpike that was dated October 31, 2020. (C. 77). A speaker box was located underneath the rear seat. (C. 77). Officer McElroy turned the box on its side and observed plastic wrapping inside. (C. 77). He reached his hand into the void and felt plastic

wrapped bundles that he believed to contain illegal narcotics. (C. 77). Hare was read his Miranda warnings and placed under arrest. (C. 77).

Officer McElroy contacted Corporal Jason Kolbe and informed him of the circumstances. (C. 77). Officer Smith took photographs of the scene. (C. 77). Officer McElroy requested a tow truck to respond to the scene. The cellular phones were placed into airplane mode. (C. 77). Officer McElroy used a drill to remove the screws from the speaker box. (C. 77). Located inside the speaker box were ten wrapped plastic bundles of U.S. currency. (C. 77). The bundles had writing on them that read "10,000 LAH". Officer McElroy notified Corporal Kolbe of the discovery of the currency. (C. 77).

DEA Task Force Agents Daniel Middleton and Andrew Harville then arrived at the scene. (C. 78). They escorted Hare to the Criminal Investigations Division and conducted an interview of him. Mo's Towing arrived on scene and transported the vehicle to Ft. Jones in Robertsdale. (C. 78). The following items were seized and transferred to Task Force Officers Middleton and Harville in their capacities as Federal DEA Task Force Officer on November 3, 2020: ten (10) plastic wrapped bundles of United States currency, two (2) rubber banded

bundles of United States currency, and three (3) cellular phones. (C. 78, 120). The property was placed in a temporary evidence vault. (C. 120). Officer McElroy completed an arrest report and deposition against Hare for possession of Marijuana 2<sup>nd</sup> degree. (C. 78).

On November 5, the currency confiscated during the traffic stop was taken out of the evidence vault and deposited at the First Bank in Foley, Alabama. (C. 120). The bank issued two (2) cashier's checks for the currency which Task Force Officer Andrew Harville obtained on November 20, 2020. That same day, Officer Harville transported the checks to the DEA Mobile Resident Office. (C. 120). They were placed into another evidence vault at the DEA Mobile Resident Office. That same day, the cashier's checks were mailed to the United States Marshals Service. (C. 121).

## **STATEMENT OF THE STANDARD OF REVIEW**

A motion to dismiss on the ground of a lack of in rem jurisdiction is construed similarly to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. The review of the trial court's ruling on the motion to dismiss is *de novo*. *Nance v. Matthews*, 622 So.2d 297, 299 (Ala. 1993).

## SUMMARY OF THE ARGUMENT

The trial court appropriately dismissed the Plaintiffs' action for lack of in rem jurisdiction. On November 3, 2020, Plaintiff Yamil Hare was stopped for speeding and improper display of registration. His vehicle was subsequently searched and one gram of marijuana, \$101,960 and three (3) cellular phones were seized. That same day, the property was turned over to Federal DEA Agents. The currency was placed in a storage locker and then deposited at the First Bank in Foley, Alabama by a Federal DEA Agent. The Bank then issued cashier's checks for the funds. On November 20, 2020, the cashier's checks were transported to the DEA Mobile Resident Office and mailed to the United States Marshals Service.

Plaintiffs' Complaint addressing the return of the seized items was filed on February 4, 2021. Jurisdiction does not vest automatically in a state court under Alabama law. *United States v. Six Thousand Six Hundred Seventy Six \$6,676 Dollars in United States Currency*, 2014 U.S. Dist. LEXIS 188700, \*8 (M.D. Ala. 2014). Alabama law requires a two-step process of possession and the filing of an in rem action to vest jurisdiction in an Alabama court. *Green v. City of Montgomery*, 55 So.3d



256, 259 (Ala. Civ. App. 2009). Federal in rem jurisdiction requires only possession by federal authorities and attaches when the res is taken or detained during a time when no other court has jurisdiction over the res. *Green* at 264, quoting 21 U.S.C. §881(c). There is no confusion, as the Plaintiffs allege, as to the time that jurisdiction vested in the federal court. Jurisdiction vested in the federal court on November 3, 2020 and the trial court appropriately dismissed Plaintiffs' Complaint.

## ARGUMENT

### **I. The trial court properly dismissed the Plaintiffs' Complaint for lack of in rem jurisdiction.**

In rem jurisdiction refers to the court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it. *Black's Law Dictionary* 982 (10<sup>th</sup> ed. 2014). A court obtains in rem jurisdiction when it validly seizes property so that it is brought within the control of the court. *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 85 (1992). Judicial control of the res may be either actual or constructive. *Id* at 87. "[T]hat court which first acquires [in rem] jurisdiction draws to itself the exclusive authority to control and dispose of the res." *Ex parte Consolidated Graphite Corp.*, 129 So. 262, 265 (1930).

In an adoptive seizure case, concurrent federal and state in rem jurisdiction cannot attach to the same seized property. *Green v. City of Montgomery*, 55 So.3d 256, 259 (Ala. Civ. App. 2009). Alabama law requires a two-step process before state jurisdiction attaches: possession and the filing of an in rem action. *Gray v. City of Opelika*, 216 So.3d 431, 436 (Ala. Civ. App. 2015). If federal in rem jurisdiction attached to the seized property before the initiation of the Plaintiff's action, the

trial court lacks in rem jurisdiction and any judgment other than one dismissing the action is void. *Ruiz v. City of Montgomery*, 200 So.3d 26, 31 (2015).

Evidentiary matters may be freely submitted on a motion to dismiss that attacks jurisdiction. *Williams v. Skysite Commc'ns Corp.*, 781 So.2d 241, 245 (Ala. Civ. App. 2000). When a party has moved to dismiss the case for lack of in rem jurisdiction, the party asserting in rem jurisdiction bears the burden of proving it. See *Ex parte Safeway Ins. Co. of Alabama, Inc.*, 990 So.2d 344, 349 (Ala. 2008). If the moving party presents a prima facie showing of the court's lack of in rem jurisdiction, the nonmoving party's jurisdictional allegations carry no presumptive weight. The nonmoving party must then rely on more than the allegations in the complaint by substantiating the jurisdictional allegations with competent proof. See *Ex parte Covington Pike Dodge, Inc.*, 904 So.2d at 229 (regarding dismissal based on lack of personal jurisdiction).

The *Green v. City of Montgomery* case, 255 So.3d 256 (Ala. Civ. App. 2009), contains a seizure that most closely mimics the seizure in the case at bar. In *Green*, on December 6, 2006, Montgomery police

officers stopped the claimants as they were traveling through Montgomery on I-65. While issuing the claimants a speeding ticket, the officers smelled a strong marijuana odor and noticed a large amount of cash in a bag on the floorboard behind the passenger seat. The officers asked for permission to search the vehicle, and the claimants did not respond. The officers ordered a K-9 unit to the scene to conduct an open-air search. *Id* at 258.

The search resulted in a positive identification of marijuana in the passenger door. *Id*. The officers then conducted a full search of the vehicle that produced a small amount of marijuana and additional cash. The officers seized the marijuana and all the cash, totaling \$32,353. Johnny Brown, the claimant closest to the marijuana, was charged with unlawful possession of marijuana in the second degree.

The City filled out the requisite forms to begin the adoptive-procedure process on December 27, 2006. On December 29, 2006, the claimants filed a “Complaint and Motion for Release and Return of Seized Money” in the Montgomery Circuit Court. *Id* at 258. The DEA formally adopted the seizure on January 11, 2007 and the United States Marshals took custody of the money on January 23, 2007. *Id*. The Court

held that the state court retained jurisdiction of the property because the Plaintiff's complaint was filed in state court prior to the transfer of the property to the DEA.

In reaching that holding, the Court determined that there were two (2) ways to exert federal control over the res: 1) the DEA's acceptance of the adoptive-seizure request from the state agency, or 2) the federal agency's physical possession of the currency. *Id* at 263-264. The Court reiterated this position in *Ex parte City of Montgomery*, 275 So.3d 1154 (Ala. Civ. App. 2018) ("If the DEA or some other federal agency seized the vehicle at the time of Richard's arrest or took possession of the vehicle before Mellissa initiated her action on January 23, 2018, the relevant federal court has jurisdiction over the action to the exclusion of the circuit court because federal jurisdiction attaches at the moment of possession"); See also *Ruiz v. City of Montgomery*, 200 So.2d 26, 30 (Ala. Civ. App. 2015) (holding that the federal court had jurisdiction over res where United States Marshals had possession of the currency before Ruiz filed his Complaint in the trial court).

The Plaintiffs rely on *Little v. Gaston*, 232 So.3d 231 (Ala. Civ. App. 2017) in support of their position that possession of the res does

not amount to control for the purposes of establishing federal jurisdiction, however, that reliance is misplaced. *Little* involved the seizure of funds pursuant to a search warrant issued by the Montgomery County Circuit Court, which had jurisdiction over the house from which the funds were seized. *Id* at 234. The trial court derived its authority to issue the search warrant from Ala. Code §§15-5-2(2) and (3). The Court held that, by operation of law, any search warrant issued pursuant to those sections impliedly commanded that the law enforcement officer who seized the property shall retain possession of the property subject to the further orders of the court issuing the search warrant. Because the Montgomery County trial court issued the search warrant, in rem jurisdiction attached at the moment of seizure. *Id* at 235-236. The Court specifically noted that the holding did not conflict with the holding in *Green* because *Green* involved a warrantless traffic stop. *Id*.

Plaintiffs also cite to several cases that they contend stand for the proposition that the federal courts have held that federal jurisdiction begins only with formal adoption of a seizure. This argument is also erroneous. The Court in *\$6,676 in U.S. Currency* held only that the trial

court did not have jurisdiction because both federal approval of the seizure and possession of the res preceded any potential action in state court. *\$6,676 in U.S. Currency* at \*9. Plaintiffs cite to *United States v. \$19,855 in U.S. Currency*, 2012 U.S. Dist. LEXIS 164737 at \*10-11 (M.D. Ala. 2012) but the quote contained in Plaintiffs' Brief is not located within the case. The Court in *\$19,855 in U.S. Currency*, relying on *Green*, held that in rem jurisdiction did not immediately vest in the state court at the time of seizure. *Id* at \*9-10. None of the cases cited by the Plaintiffs contain a holding that is inapposite to the holding in *Green*.

So long as the state court has not exercised in rem jurisdiction, federal jurisdiction begins the moment the res is controlled by federal agents. *Green* at 263, citing to *United States v. \$506,231 in United States Currency*, 125 F.3d 442 (7<sup>th</sup> Cir. 1997). The federal government controls the res when it is "taken or detained" during a time when no other court has jurisdiction over the res. *Green* at 264. Once the federal government has taken possession of property subject to seizure under 21 U.S.C. §881, such property is not repleviable, subject only to orders

from the court having jurisdiction over the forfeiture proceeding. See *Edney v. City of Montgomery*, 960 F.Supp. 270, 273 (M.D. Ala. 1997).

On November 3, 2020, the United States Currency and cellular phones that were seized during the arrest of Yamil Hare were transferred from Task Force Officer Stacy McElroy to DEA Agent Daniel Middleton. (C. 127). The affidavits and exhibits submitted to the trial court by the Defendants reflect that transfer. On November 5, 2020, the currency was deposited at the First Bank in Foley, Alabama where it remained until November 20, 2020. On that date, the bank issued two (2) cashier's checks for the currency which DEA Agent Andrew Harville transported the checks to the DEA Mobile Resident Office. They were then mailed to the United States Marshals Service. It was not until February 4, 2021 that the Plaintiffs filed their Complaint in the Circuit Court of Baldwin County seeking the return of the res.



## CONCLUSION

Federal jurisdiction vested in the res on November 3, 2020. The trial court acted appropriately in granting the Motions to Dismiss filed by the Defendants and the judgment entered by the trial court is due to be affirmed.

Respectfully Submitted:

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in *Ala. R. App. P.* 28(j)(1). According to the word count function of Microsoft Word, the brief contains 3,872 words from the Statement of the Case through the Conclusion. I further certify that this brief complies with the font requirements set forth in *Ala. R. App. P.* 32(a)(7). This brief is prepared in the Century Schoolbook font using 14-point type. *See Ala. R. App. P.* 32(d).

*s/Andrew J. Rutens*  
**Andrew J. Rutens**

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>st</sup> day of July, 2021 I electronically filed the foregoing Brief of Appellee, City of Gulf Shores, Alabama, with the Alabama Supreme Court by using the Court's electronic filing system, ACIS, and mailed a copy of same to the Clerk of the Supreme Court of Alabama via certified mail. I have also mailed a copy of the foregoing via United States Mail, first class postage prepaid, to the following:

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