

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 102 MAP 2016

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

\$34,440.00 U.S. CURRENCY

APPEAL OF: RAFAEL FALETTE

*BRIEF OF AMICUS CURIAE,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA*

Appeal from the April 19, 2016 Order of the
Commonwealth Court at Docket No. 1021 C.D. 2014,
Affirming the Order of the
Court of Common Pleas of Monroe County

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STATE CASES

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Com. v. Three Hundred Ten Thousand Twenty Dollars, 894 A.2d 154 (Pa. Commw. Ct. 2006)20

Com. v. Younge, 667 A.2d 739 (Pa. Super. Ct. 1995)26

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OTHER AUTHORITIES

Christopher Ingraham, *In Tough Times, Police Start Seizing a Lot More Stuff from People*, The Washington Post (Nov. 10, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/10/report-t-in-lean-times-police-start-taking-a-lot-more-stuff-from-people/>.....8

Andrew Schneider & Mary Pat Flaherty, *Presumed Guilty: The Law’s Victims in the War on Drugs*, The Pittsburgh Press (Aug. 11, 1991)9

Michael Sallah, Robert O’Harrow Jr., Steven Rich, & Gabe Silverman, *Stop and Seize*, The Washington Post (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>9, 10

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization of over 500,000 members. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil rights laws. The ACLU of Pennsylvania is one of its state affiliates, with over 27,000 members throughout Pennsylvania. The ACLU and ACLU of Pennsylvania have appeared many times as *amicus curiae* in federal and state courts at all levels, including both civil and criminal proceedings, in cases in which government action threatened civil rights or constitutional rights. The special interest and the expertise of the ACLU of Pennsylvania with respect to civil asset forfeiture are substantial.

The ACLU of Pennsylvania seeks to appear as *amicus curiae* in this appeal to call this Court's attention to the many ways in which Pennsylvania's civil forfeiture laws have been abused to take property from innocent people—disproportionately low-income people and people of color—with few procedural safeguards. *Amicus* seeks to impress upon the Court the need for a strict and narrow construction of the rebuttable presumption set forth in the Controlled Substances Forfeiture Act and a common-sense interpretation of the Commonwealth's burden of proof to help curb such abuses. We respectfully

submit this amicus brief in the hope that the participation of the ACLU of Pennsylvania will assist the Court in resolving the significant issues of public importance implicated by the Commonwealth Court's opinion.

INTRODUCTION

Civil forfeiture in Pennsylvania has strayed from its original intent, morphing into a tool that unjustly deprives many innocent citizens of property and has a disproportionate impact on poor people and people of color. In the case under appeal, the lower courts made distinct errors in ruling that the Commonwealth had met its burden to prove that the cash at issue was subject to forfeiture. First, the court erred by holding that Commonwealth had proved the basis for forfeiture based solely on a rebuttable presumption that money found in proximity to drugs is the proceeds of, or was used to facilitate, drug trafficking, despite record evidence undermining this conclusion. Second, the court failed to adequately explain and support its ruling that Appellant Rafael Falette had not rebutted the presumption that the money was subject to forfeiture and demonstrated a viable “innocent owner” defense.

Overturning the lower court rulings will not serve only to correct the injustice done to Falette in this case; it will also serve as a check against abuse of civil forfeiture and confirm that innocent citizens have meaningful procedural mechanisms for challenging the Commonwealth’s seizure of their property, including by holding the Commonwealth to its burden of proof or by proving an “innocent owner” defense.

FACTUAL BACKGROUND

This case arises out of a stop on Interstate 80 by a Pennsylvania State Police officer. *Com. v. \$34,440.00 U.S. Currency*, 138 A.3d 102, 104, 112 (Pa. Commw. Ct. 2016), appeal granted sub nom. *Com.v. \$34,440.00 U.S. Currency*, 344 MAL 2016, 2016 WL 5947362 (Pa. Oct. 13, 2016). Although the trooper testified that the stop was for tailgating, the driver, Juan Lugo, denied that he was tailgating and he was not charged with tailgating or any other traffic offense. Lugo produced a registration card proving that his sister owned the car. *Id.* at 104. He consented to a search of the vehicle, which revealed four ecstasy pills in the cigarette outlet in the center console area of the car and four small plastic bags containing marijuana in the right rear passenger door. *Id.*

The driver, Lugo, admitted that the drugs were his. This admission was used to prosecute him criminally; Lugo was charged with “Possession of a Small Amount of Controlled Substance, Personal Use.” R. 3(a), Forfeiture Pet., ¶ 7. The evidence at his criminal trial proved that Lugo possessed the marijuana for personal use, and did not intend to distribute it. He was convicted and punished with a fine of \$105 and 1530 days in jail. The Commonwealth has never argued that any of the drugs in the car belonged to anyone other than Juan Lugo, and there is no evidence in the record that would support such an argument.

The trooper’s search of the car also revealed \$34,440 in cash hidden under the seatbelt attachment in the “B pillar” (one of the support posts that connect a car’s roof to its body at the rear of the front door) on the passenger side of the car. *Id. at* ¶¶ 2, E. The cash was packaged in plastic bags, in denominations of hundred dollar, fifty dollar, and twenty dollar bills.¹ There is no evidence in the record that the nature of this packaging—cash arranged by denomination and placed in plastic bags—in any way suggests that it was derived from or involved in drug sales. Lugo and the other passengers denied owning the cash or knowing that it was there. *Id. at* ¶ 7(I).

The Commonwealth filed a petition seeking to forfeit the \$34,440 found in the car. *Id.* The petition admitted that Lugo was not the owner of the cash. R. 3(a), Forfeiture Pet., ¶ 7(I). Appellant Rafael Falette, who was not present during the traffic stop, filed an answer stating that he owned the cash, which was derived from the settlement of a personal injury lawsuit. Attached to Falette’s answer were two checks from a law firm, totaling \$37,700.55, made out to Falette with the notation “Settlement Proceeds to Client” or “Settlement Funds.” R. 9a-14a. At a subsequent hearing, Falette testified that he was a long-time friend of Lugo and Lugo’s sister, and explained that he deposited those checks just weeks before the

¹ Although the record is thin on the precise nature of the packaging, as Judge Leavitt observed below, packaging by denomination usually suggests packaging by bank wrappers. *\$34,440.00 U.S. Currency*, 138 A.3d at 112 n.4.

traffic stop. \$34,440.00 U.S. Currency, 138 A.3d at 105-06. He said he spent some of the proceeds, and then “stashed” the remaining \$34,440.00 inside the B Pillar of the car, which he regularly borrowed. *Id.* at 106.

Notwithstanding Falette’s testimony that the cash belonged to him and evidence that it was lawfully acquired, the Court of Common Pleas ruled that the Commonwealth had satisfied its burden to prove that the cash was subject to forfeiture under the Controlled Substance Act. *Id.* The Commonwealth Court upheld the lower court’s ruling in a 3-2 decision. *Id.* at 119.

ARGUMENT

I. Overturning the Lower Court Rulings Will Support the Policy Behind Forfeiture and Prevent Further Injustice in its Use by the Commonwealth.

Like many states, Pennsylvania's current civil forfeiture laws have their origin in the War on Drugs and are modeled on federal law. The vast majority of forfeitures in Pennsylvania occur under the Controlled Substances Forfeiture Act. *See* 42 Pa. Cons. Stat. Ann. §§ 6801–6802. Like its federal counterpart, Pennsylvania's statute is used aggressively and leads to high rates of default. It is characterized by a low burden of proof on the government and few procedural protections for property owners. And concurrent with national trends, Pennsylvania's civil asset forfeiture laws incentivize law enforcement to aim civil forfeiture enforcement efforts at people who are unable or unlikely to fight back, particularly poor people of color who are unrepresented by counsel.

A. National Trends Concerning Forfeiture Demonstrate the Growing Abuse of the Practice.

Nationwide, civil forfeiture has evolved from a tool primarily used to combat piracy into a weapon that law enforcement deploys aggressively to take billions of dollars of property each year with a tenuous connection to drug crime, often from innocent people, and disproportionately from people of color who are

not represented by counsel.² The history of federal civil forfeiture, characterized by documented governmental abuse and failed reform efforts, provides an important backdrop for the Court’s consideration of the proper application of the Commonwealth’s burden of proof and the “innocent owner” defense. The level of governmental overreach observed at the federal level and mirrored in Pennsylvania requires a strong judicial response to ensure robust protection for property owners.

Forfeiture was employed sporadically until Congress expanded its reach in the 1970s and 1980s and earmarked forfeiture income exclusively for law enforcement, instead of depositing such funds in the United States Treasury. Consequently, the Department of Justice’s federal asset forfeiture fund grew from \$338 million in 1996 to more than \$2.0 billion by 2010.³

As that progression happened, civil forfeiture practices came under increasing public scrutiny. Although primarily intended to strip drug kingpins of the tools of their trade, ordinary citizens increasingly bore the brunt of civil forfeiture as their property was taken in high-volume highway traffic stops and

2 For additional background on national forfeiture patterns and their consequences, see the *Amicus* brief filed in this Court by ACLU of Pennsylvania and other *amici* in *Com. v. Real Property and Improvements Commonly Known as 416 S. 62nd St., Philadelphia, PA, and 1997 Chevrolet and Contents Seized from James Young*, Nos. 29 & 30 EAP 2015.

3 See Christopher Ingraham, *In tough times, police start seizing a lot more stuff from people*, The Washington Post (Nov. 10, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/10/report-in-lean-times-police-start-taking-a-lot-more-stuff-from-people/>.

low-level neighborhood drug transactions. The *Pittsburgh Press* published a series in 1991 reflecting ten months of national research on civil asset forfeiture. After reviewing 25,000 drug seizures, interviewing 1,600 witnesses, and reviewing court documents in 510 cases, the *Press* concluded that “seizure and forfeiture, the legal weapons meant to eradicate the enemy, have done enormous collateral damage to the innocent.”⁴

A 2014 *Washington Post* series provides additional evidence of widespread civil forfeiture abuse. The *Post* series documented aggressive policing practices in highway interdictions resulting in the seizure of hundreds of millions of dollars in cash from motorists and others not charged with crimes.⁵ Property owners were required to fight lengthy legal battles to get their property back and to prove that their possessions were lawfully acquired. Only one out of six property seizures was legally challenged, but when a challenge occurred, the government voluntarily returned seized cash in 41% of the cases. The *Post* series exposed police practices that went so far as to employ outside consultants to instruct law enforcement authorities on how to successfully target cash on the nation’s highways.

4 Andrew Schneider & Mary Pat Flaherty, *Presumed Guilty: The Law’s Victims in the War on Drugs*, The Pittsburgh Press (Aug. 11, 1991).

5 The *Post* series documented 61,998 cash seizures on highways since 2001. Under equitable sharing rules, federal authorities shared \$1.7 billion of the \$2.5 billion revenues with state law enforcement authorities. See Michael Sallah, Robert O’Harrow Jr., Steven Rich, & Gabe Silverman, *Stop and Seize*, The Washington Post (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

And in 400 federal court cases examined by *The Post* where property owners were at least partially successful in challenging the seizures of their property, the majority of property owners were people of color.⁶ The abuse of civil forfeiture for pecuniary gain led two former leaders of the Department of Justice’s Asset Forfeiture Office to argue that civil forfeiture should now be abolished.⁷

B. Defending Against Civil Forfeiture Under Pennsylvania Law Is Exceedingly Difficult, Particularly for Property Owners Who Cannot Afford Counsel.

As under federal law, in Pennsylvania, the government can seize and retain a person’s property—everything from the cash in her wallet to her personal belongings, car, and home—if law enforcement alleges that there is some connection between the property and a crime. A person whose property is being

6 Among many examples, the *Post* series highlighted the plight of a 40-year-old Hispanic carpenter from New Jersey who was stopped on Interstate 95 in Virginia for having tinted windows and had \$18,000 taken from him that was meant to buy a used car. In another case, police took \$17,550 from Mandrel Stuart, a 35-year-old African-American owner of a small barbecue restaurant in Virginia during a stop in 2012 for a minor traffic infraction on Interstate 66. While he eventually got his money back, he lost his business because police had deprived him of the cash necessary to pay his overhead. *Id.*

7 See John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool into an Evil*, *The Washington Post* (Sept. 18, 2014), https://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html (“The program began with good intentions but now, having failed in both purpose and execution, it should be abolished”).

taken through forfeiture does not have to be charged with, much less convicted of, a crime, as evidenced by Mr. Falette's case.⁸

Because forfeiture is a civil *in rem* proceeding, the property owner lacks essential legal protections afforded to criminal defendants. *Com. v. All That Certain Lot or Parcel of Land Located at 605 Univ. Drive*, 104 A.3d 411, 426 (Pa. 2014). The requirement in a criminal case for the government to prove its case beyond a reasonable doubt does not apply in civil forfeiture proceedings. *Id.* (citing *Com. v. \$6,425.00 Seized from Esquilin*, 880 A.2d 523, 529 (Pa. 2005)). To meet its evidentiary burden, the prosecution may rely on evidence that would be inadmissible in a criminal proceeding under the rules of evidence. 42 Pa. Cons. Stat. Ann. § 6802(h). Once the prosecution meets this low burden, the property owner is then required to affirmatively prove the “innocent owner” defense, as discussed below. 42 Pa. Cons. Stat. Ann. § 6802(j); 42 Pa. Cons. Stat. Ann. § 6801(a)(4)(ii), (a)(6)(ii); *Com. v. Marshall*, 698 A.2d 576, 578 (Pa. 1997); *see also infra*, § III. In this manner, civil forfeiture inverts the traditional presumption of innocence afforded to defendants in criminal proceedings.

Property owners have no right to appointment of counsel in a civil forfeiture proceeding. *605 Univ. Drive*, 104 A.3d at 426 (citing *Com. v. \$9,847.00 U.S.*

⁸ *See United States v. Bajakajian*, 524 U.S. 321, 330 (1998) (“The theory behind [civil forfeitures] was the fiction that the action was directed against ‘guilty property,’ rather than against the offender himself.”).

Currency, 704 A.2d at 616-17 (Pa. 1997)). Nor do Pennsylvania’s civil forfeiture laws authorize a prevailing claimant to recoup her attorneys’ fees, which makes it difficult, if not impossible, for most property owners to pay out-of-pocket for an attorney, even for clearly meritorious claims challenging baseless forfeitures. Unsurprisingly, the available evidence suggests that most Pennsylvanians who lose property through civil forfeiture each year are unrepresented.⁹

Challenging a civil forfeiture can be an overwhelming undertaking for individuals who are not represented by counsel. When a civil forfeiture action is brought against a home, the owner often must undertake a separate legal process to address complex tangled title or estate issues before she even has legal standing to defend the home against forfeiture. Once a respondent’s standing is established, she must file an answer, in which affirmative defenses, like the “innocent owner” defense, must be invoked or else they are deemed to be waived. The District

9 See Isaiah Thompson, *Cash Machine: How the Philly DA seizes millions in alleged crime money—whether there’s been a crime or not*, Philadelphia City Paper (Nov. 28, 2012), <http://citypaper.net/The-Cash-Machine> (“Most individuals who do pursue the return of their property do so pro se—that is to say, alone. . . . Aside from occasional private attorneys hired by individual respondents, there is no one else in the room representing their interest.”); Testimony Presented to Senate Judiciary Comm. by Louis S. Rulli, Practice Professor of Law & Dir. of Clinical Programs, Univ. of Pennsylvania Law School (Oct. 20, 2015), <http://www.senatorgreenleaf.com/wp-content/blogs.dir/39/files/2015/10/Testimony-of-Louis-Rulli.pdf> (noting that years of court observations suggest property owners in Philadelphia forfeiture court are “overwhelmingly” unrepresented by counsel).

Attorney may then serve lengthy interrogatories on the property owner.¹⁰ In addition to the burden of responding to discovery, challenging forfeiture usually requires multiple court appearances.¹¹

Filing legal pleadings and answering voluminous discovery requests, taking multiple days off from work or family responsibilities to appear in court, and hiring an attorney are often prohibitive burdens for property owners, even for those with strong claims facing the devastating loss of a family home or vehicle. In cash forfeiture cases, which constitute the majority of forfeitures brought in Pennsylvania,¹² it is often irrational to choose to spend time and money contesting

10 *See, e.g., 605 Univ. Drive*, 104 A.3d at 426 (holding that the Rules of Civil Procedure apply as to procedural issues not addressed in the text of 42 Pa. Cons. Stat. Ann. §§ 6801, 6802). In Philadelphia, the DA’s office often requires property owners to provide written answers to many pages of interrogatories such as “Did you file a federal, state, or local tax return since January 1995? If so, please identify which ones you filed and when.” Scott Kelly, *Guilty Property—How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It*, American Civil Liberties Union of Pennsylvania, 6-7 (June 2015), <http://www.aclupa.org/forfeiture> (hereinafter “ACLU-PA, *Guilty Property*”) (citing interrogatories from 2011 civil forfeiture case in the First Judicial District of Philadelphia).

11 A 2012 article reported that property owners sometimes had to appear at more than ten court dates in Philadelphia’s forfeiture courtroom before reaching a hearing before a judge. Thompson, *Cash Machine*, *supra* note 9; *see also* ACLU-PA, *Guilty Property*, *supra* note 10, at 6 (median of four court appearances required for all civil forfeiture petitions filed in Philadelphia County from 2011 to 2013).

12 In the last year for which data is available, only two counties earned more forfeiture revenue from the sale of personal or real property than from forfeitures of cash. Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Controlled Substances)*, at 34 (attached hereto as Exhibit A) (reporting that Huntingdon County received \$0 from cash forfeitures and \$1,950 from the sale of forfeited property); *id.* at 37 (reporting that Juniata County received \$0 from cash forfeitures and \$4,000 from the sale of forfeited property).

the forfeiture because the value of the property at stake is often dwarfed by the expense and burden of bringing the challenge.¹³ Thus, in light of the high costs and burdens of challenging a forfeiture petition, it is often neither possible nor economically rational for many property owners to challenge forfeiture, even when they are innocent and there is no legal basis for the forfeiture.¹⁴

Unsurprisingly, the government wins the overwhelming majority of forfeiture cases filed in Pennsylvania, mostly by default when the property owner fails to file a written response to the forfeiture petition or misses a court date. When a forfeiture case ends in default, the prosecution never has to present any evidence to support the forfeiture. In Philadelphia, approximately 87% of property

13 The sums of cash at issue can be just a few hundred dollars. In Philadelphia, from 2011 to 2013, the median value of cash forfeiture cases was \$192. ACLU-PA, *Guilty Property*, *supra* note 10, at 7. In Montgomery County, from 2012 to 2014, the median value of a forfeiture case was \$307, and the District Attorney regularly pursued forfeitures of sums under \$100, and in one instance, even a single dollar. Scott Kelly, *Broken Justice—An Investigation of Civil Asset Forfeiture in Montgomery County*, American Civil Liberties Union of Pennsylvania, at 4 & nn.6, 18 (Oct. 2015), <http://www.aclupa.org/forfeiture> (hereinafter “ACLU-PA, *Broken Justice*”). In Cumberland County, half of all cash-only forfeiture cases arising from seizures between 2011 and 2013 involved less than \$356. Scott Kelly, *Forfeiture in the Shadows—An Investigation of Civil Asset Forfeiture in Cumberland County*, American Civil Liberties Union of Pennsylvania, at 5 & nn.20-22 (Dec. 2015), <http://www.aclupa.org/forfeiture> (hereinafter “ACLU-PA, *Forfeiture in the Shadows*”). An investigation of more than 700 forfeiture petitions filed in Lancaster County since 2012 also found that a majority involved “small amounts of cash—often under \$500.” Gil Smart & Susan Baldrige, *Civil asset forfeiture: Policing for Profit?* LancasterOnline (Nov. 2, 2014). This is troubling evidence that civil forfeiture is not actually being used to cripple cartels and drug kingpins, as it was intended. See Yoder & Cates, *supra* note 7.

14 See, e.g., Thompson, *Cash Machine*, *supra* note 9.

owners faced with a civil forfeiture petition lose their property by default.¹⁵ In Montgomery County, 90% of forfeiture cases end in default.¹⁶ In Lancaster County, a review of forfeiture cases since 2012 turned up just four instances in which a property owner challenged the government’s forfeiture petition.¹⁷

C. Pennsylvania Law Gives Law Enforcement Agencies a Direct Financial Incentive to Use Pennsylvania’s Civil Forfeiture Laws Aggressively Against Property Owners Who Are Least Able to Contest the Forfeiture.

While property owners face many structural obstacles to challenging forfeiture actions, law enforcement has a direct pecuniary incentive to forfeit as much property as possible.¹⁸ One hundred percent of the proceeds from forfeiture go to the law enforcement agencies charged with making decisions about whether to pursue forfeiture. 42 Pa. Cons. Stat. Ann. § 6801(e)–(g).

Pennsylvania law enforcement agencies reported taking in a staggering \$19.2 million worth of forfeited property in 2013-2014.¹⁹ Philadelphia’s forfeiture

15 ACLU-PA, *Guilty Property*, *supra* note 10, at 5 & n.20.

16 ACLU-PA, *Broken Justice*, *supra* note 13, at 4 & n.7.

17 Smart & Baldrige, *supra* note 13.

18 *See, e.g., Com.v. 1997 Chevrolet*, 106 A.3d 836, 878 (Pa. Commw. Ct. 2014) (Pellegrini, J., concurring) (“[An] overriding governmental interest is to instill confidence in the criminal justice system. The present forfeiture regime severely undermines that confidence because of the inherent conflict of interest that a district attorney has in seeking forfeiture to fund his or her expenditures that the Commissioners or Council have chosen not to fund.”).

19 *See* Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Controlled Substances)*; Office of the Pennsylvania Attorney General, *Asset*

revenues, consistently the highest in the state, totaled \$3,428,288 in 2013-2014—the equivalent of more than 10% of the District Attorney’s appropriated budget.²⁰ Philadelphia has taken in about \$5 million each year on average over the last decade.²¹

Forfeiture proceeds supplement the budgets allocated to law enforcement agencies by the legislature. Indeed, current law actually prohibits the legislature from reducing any agency’s appropriated budget in reliance on expected forfeiture revenues. 42 Pa. Cons. Stat. Ann. § 6801(f), (k). Civil forfeiture gives police and prosecutors the power to raise their own revenues and use the new funds as they see fit. In this way, civil asset forfeiture thwarts the democratic process, circumventing the legislature and the transparency, accountability, and oversight functions that are built into the normal budgeting process.

Law enforcement’s direct financial stake in the outcome of a forfeiture proceeding also creates a strong incentive to pursue forfeitures that will not be

Forfeiture Report, Fiscal Year 2013-14 (Chop Shop). During the last fiscal year for which data is available, eight county prosecutors’ offices in Pennsylvania took in more than half a million dollars in income derived from forfeited property. *See* Exhibit B (charts of forfeiture revenues of the top income-generating counties).

20 Office of the Pennsylvania Attorney General, *Asset Forfeiture Report, Fiscal Year 2013-14 (Controlled Substances)* at 53; Rob Dubrow & Josefine Arevalo, *City of Philadelphia Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 2014*, at 157, <http://www.phila.gov/investor/pdfs/2014CAFR.pdf> (District Attorney budget of \$32,808,000).

21 *See* Exhibit B (charts of forfeiture revenues of the top income-generating counties).

challenged. Contested litigation can be expensive and time-consuming, but the cost of filing a forfeiture case that ends in default is minimal. In Philadelphia, an analysis of several years of court records revealed that the District Attorney’s office robo-signed and filed the same boilerplate petition in every cash forfeiture case, making the additional cost of prosecuting each unchallenged forfeiture case negligible.²²

Enforcement strategies directed at people unlikely to challenge forfeitures are, in turn, likely to affect low-income communities of color disproportionately. First, in Pennsylvania, poor people—those with the least ability to hire an attorney to challenge a forfeiture—are disproportionately likely to be people of color.²³ Similarly, focusing forfeiture enforcement on low-income neighborhoods is also likely to disproportionately affect people of color.²⁴

22 ACLU-PA, *Guilty Property*, *supra* note 10, at 8.

23 *Poverty Rate by Race/Ethnicity*, Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (13% of Pennsylvanians live in poverty, including 9% of white Pennsylvanians, 25% of African-American Pennsylvanians, and 29% of Hispanic Pennsylvanians).

24 See Sean Reardon et al., *Neighborhood Income Composition by Race and Income, 1990-2009*, *The Annals of the American Academy of Political and Social Science* 660(1), 78-97 (2015) (African-American and Hispanic families are much more likely to reside in lower income neighborhoods than families of the same income level but of another race). As Judge Leavitt noted in dissent below, recent forfeiture cases out of Monroe County tend to fit a pattern, arising out of traffic stops—which do not result in any traffic-related charges—of drivers from predominantly Hispanic areas. *\$34,440.00 U.S. Currency*, 138 A.3d at 112 n.2.

D. Communities of Color Disproportionately Bear the Burden of Pennsylvania's Harsh Civil Forfeiture Laws.

In light of the incentives for law enforcement to aggressively pursue forfeiture, and the dearth of procedural protections that allows abusive practices to thrive, it is especially troubling that studies consistently reveal racial disparities in whose property is targeted for forfeiture in Pennsylvania. Indeed, the racial disparities among Pennsylvania's forfeiture victims are even more pronounced than the racial disparities in arrest rates for offenses punishable by forfeiture. Disparities in civil forfeiture thus add yet another layer of unfairness and inequity to a criminal justice system already plagued by these problems.

For example, in Philadelphia, African-American people make up only 44% of the city's population, and 60% of those arrested for forfeitable offenses.²⁵ African-American people comprise 63% of owners subject to forfeiture, raising the question of whether law enforcement bias similarly affects the racial disparity in civil forfeiture enforcement.²⁶ The disparity is even more pronounced for property owners who have lost property to forfeiture even though they have not been

25 ACLU-PA, *Guilty Property*, *supra* note 10, at 10 & n.44.

26 *Id.* at 10.

convicted of a crime related to the forfeiture: approximately 70% of these innocent owners are African-American.²⁷

The racial disparities in civil forfeiture enforcement extend beyond Philadelphia. In Montgomery County, African-American people make up 9% of the population, and 37% of those arrested for offenses punishable by forfeiture.²⁸ Yet a staggering 53% of property owners faced with forfeiture are African-American.²⁹ Likewise, Cumberland County is only 3% African-American, but African-Americans make up 15% of those arrested for forfeitable offenses and 36% of property owners targeted for forfeiture.³⁰ That means that in Cumberland County, African-American people are eighteen times more likely to be the targets of civil forfeiture than people of other races.³¹

The evidence, nationwide and in Pennsylvania, broadly demonstrates that forfeiture has inflicted injustice upon many innocent individuals, and Appellant Falette is no exception.

27 *Id.* at 10 & n.46. Approximately 37% of Philadelphia’s forfeitures of cash were not supported by a related criminal conviction, meaning that the property owner was never proven guilty of a crime punishable by forfeiture. ACLU-PA, *Guilty Property*, *supra* note 10, at 4, 9 & n.8.

28 ACLU-PA, *Broken Justice*, *supra* note 13, at 6 & n.22.

29 *Id.* at 6.

30 ACLU-PA, *Forfeiture in the Shadows*, *supra* note 13, at 5 & n.24.

31 *Id.* at 5-6 & n.25.

II. The Commonwealth Court’s Misapplication of the “Close Proximity” Presumption Deprives Property Owners of an Important Protection Against Forfeiture.

The Commonwealth Court’s ruling that cash in “close proximity” to drugs satisfies the Commonwealth’s *prima facie* case renders the Commonwealth’s burden of proof meaningless for many forfeiture victims. This Court should overturn the lower court rulings and recognize that the Commonwealth failed to establish a *prima facie* case. The Commonwealth relied solely on a statutory presumption to satisfy its burden, and the court ignored the record evidence that undercut the Commonwealth’s *prima facie* case. By effectively converting a rebuttable presumption into a conclusive, irrefutable presumption, the lower courts misapplied the clear text of section 6801(a)(6)(ii) of the Forfeiture Act and created an insurmountable barrier to an innocent owner reclaiming his lawfully-owned property. This application of section 6801(a)(6)(ii) is contrary to legislative intent, and undermines the few existing legal protections against forfeiture available to Pennsylvanians.

In a civil forfeiture case involving currency, the Commonwealth has the burden of proof. *See Marshall*, 698 A.2d at 578; *Com. v. Three Hundred Ten Thousand Twenty Dollars*, 894 A.2d 154, 160–61 (Pa. Commw. Ct. 2006). Under the Controlled Substances Forfeiture Act, 42 Pa. C.S. §§ 6801–6802, the Commonwealth must show that the currency was “furnished or intended to be

furnished . . . in exchange for a controlled substance . . . [or represents] proceeds traceable to such an exchange” or that the currency was “used or intended to be used to facilitate any violation of The Controlled Substance, Drug, Device and Cosmetic Act.” 42 Pa. C.S. § 6801(a)(6)(i)(A)–(B). In other words, the Commonwealth must establish by a preponderance of the evidence that a nexus exists between the cash seized and a violation of the Controlled Substance Act. *Esquilin*, 880 A.2d at 529.

When money is found in close proximity to illegal controlled substances, a rebuttable presumption exists that the money was derived from, or used to facilitate, drug trafficking. 42 Pa. C.S. § 6801(a)(6)(ii).³² This rebuttable presumption requires the factfinder to reach that conclusion in the absence of contrary evidence. *Com. v. \$259.00 Cash U.S. Currency*, 860 A.2d 228, 231, n.6 (Pa. Commw. Ct. 2004), *as amended* (Oct. 19, 2004) (citing *Waugh v. Com.*, 146 A.2d 297 (1958)).

In every case, the Commonwealth must prove by a preponderance of evidence that forfeiture is warranted under sections 6801–6802 of the Forfeiture

32 42 Pa. C.S. § 6801(a)(6)(ii) provides:

Such money and negotiable instruments found in close proximity to controlled substances possessed in violation of The Controlled Substance, Drug, Device and Cosmetic Act shall be rebuttably presumed to be proceeds derived from the selling of a controlled substance in violation of The Controlled Substance, Drug, Device and Cosmetic Act.

Act. *See Com. v. Giffin*, 595 A.2d 101, 104 (Pa. Super. Ct. 1991) (providing that a rebuttable presumption is a means by which a rule of substantive law is invoked after the underlying facts have been established); *see also Com. v. Flenory*, 5 Pa. D. & C.4th 431, 433–34 (Pa. Com. Pl. 1989) (analyzing section 6801(a)(6)(ii) in light of the prior drug forfeiture law and resulting precedent and concluding that the Commonwealth must prove by a preponderance of the evidence that money was derived from illegal drug transactions, with or without the presumption).

The proper inquiry into whether the Commonwealth has established the requisite nexus between the seized property and drug trafficking requires weighing the totality of the circumstances. *Esquilin*, 880 A.2d at 523. Circumstances that merely raise a suspicion of drug trafficking are not enough to satisfy the Commonwealth’s burden. *See Marshall*, 698 A.2d at 579; *Com. v. Freeman*, 142 A.3d 156, 162 (Pa. Commw. Ct. 2016).

Here, the Commonwealth admitted that Lugo was not the owner of the cash and that he possessed the drugs for personal use only, and relied solely on the statutory presumption to satisfy its burden, pointing to the proximity of the money to Lugo’s drugs. However, application of a rebuttable presumption is not appropriate where, as here, the record evidence undermines the logical basis for the presumption. Because forfeiture of cash is only authorized under the Controlled Substances Act when the money was derived from or used in a drug transaction, it

is illogical to apply the statutory presumption to cash found in proximity to drugs seized from drug users, rather than drug traffickers. The logic underlying the statutory presumption simply does not apply in cases such as this. It is hard to imagine any logical basis for presuming that cash found in proximity to, but indisputably not owned by, Lugo—someone guilty only of drug possession, and not trafficking—is the proceeds of the sale of drugs, or could have been used to facilitate the sale of drugs.

Furthermore, contrary to the Commonwealth's arguments, the other factors that the Commonwealth claimed supported forfeiture likewise failed to establish the requisite nexus by a preponderance of the evidence between the money and any criminal activity by Lugo. These factors were: (1) the money was stored in a location not intended by the vehicle manufacturer; (2) the passengers made inconsistent statements (not identified in the record) and pretended to be asleep; (3) the money was packaged in two bags; (4) the car was registered to Lugo's sister; (5) Lugo was convicted for possession of a small amount of marijuana and ecstasy for personal use. *\$34,440.00 U.S. Currency*, 138 A.3d at 106. The Commonwealth offered no evidence to suggest that any of these factors were consistent with drug trafficking, and certainly did not prove that the way the cash was stored was more consistent with drug trafficking than with the other explanation supported by the record evidence: that it was the proceeds of Falette's

settlement. The alleged “unusual” behavior of the passengers has very little probative value, particularly in light of the lack of any detail in the record. Carrying a large amount of cash is not against the law. *Com. v. \$9,000 U.S. Currency*, 8. A.3d 379, 388 (Pa. Commw. Ct. 2010). Nor is storing it in plastic bags in a car.

Other than the presumption that the money was related to drug trafficking because it was found in close proximity to drugs, the record evidence did not establish by a preponderance of the evidence a nexus between the seized money and Lugo’s violation of the Controlled Substance Act.³³ The undisputed facts that Lugo owned the drugs in the car for personal use, not for distribution, and that he did not own the money both undermine the conclusion that the money represented the proceeds of the sale of drugs or was used to facilitate the sale of drugs. And the Commonwealth’s arguments regarding the storage of the money and the allegedly “unusual” behavior of the passengers establishes, at best, a suspicion that the money may have been the proceeds of drug trafficking by someone, but as noted above, a mere suspicion is not enough to satisfy forfeiture. *Marshall*, 698 A.2d at 579; *Freeman*, 142 A.3d at 162. In sum, the Commonwealth failed to

33 To further illustrate this point, the Commonwealth Court admitted that “[a]lthough [additional facts] might have been relevant had the section 6801(a)(6)(ii) presumption not been triggered, which would have required the Commonwealth to rely on *other* factors to meet its initial burden of proof, that is not the case here.” *\$34,440.00 U.S. Currency*, 138 A.3d at 109.

establish a prima facie case by a preponderance of the evidence, and the forfeiture must be overturned.

III. By Upholding the Trial Court’s Ruling that Falette Failed to Establish the “Innocent Owner” Defense, The Commonwealth Court’s Ruling Effectively Guts that Defense, One of the Scant Procedural Protections Available to Pennsylvanians.

Even if this Court finds that the Commonwealth established a prima facie case, it should reverse the decision below because the court erred as a matter of law in ruling that Falette had not established the “innocent owner” defense pursuant to section 6802(j) of the Controlled Substances Forfeiture Act.

If the Commonwealth sustains its initial burden of proving a nexus by a preponderance of the evidence, the Act directs that the burden shifts to the claimant to rebut that evidence or establish an “innocent owner” defense. *Id.* To satisfy this burden, the claimant must show that he or she is an “innocent owner” by establishing that: (1) he or she owned the money; (2) he or she lawfully acquired it; and (3) he or she did not unlawfully use or possess it. 42 Pa. C.S. § 6802(j); *Marshall*, 698 A.2d at 578; *Com v. \$11,600.00 Cash*, 858 A.2d 160,167 (citing *Com. v. \$16,208.38 U.S. Currency Seized from Holt*, 635 A.2d 233, 238 (Pa. 1993)).

Because the vast majority of property owners subject to forfeiture in Pennsylvania are not represented by counsel, and lose their property through default, without ever reaching a hearing, this defense is seldom invoked. But it

remains one of the few procedural protections against forfeiture available to Pennsylvanians whose property is the subject of a forfeiture petition.

To safeguard that important procedural protection, the Court should make clear that trial courts must provide a specific, objective basis for rejecting a claimant's innocent owner defense. *1997 Chevrolet*, 106 A.3d at 870; *see also Freeman*, 142 A.3d at 164 (remanding case to trial level for more detailed analysis of claimant's evidence that he was an innocent owner). Absent evidence of the claimant's criminal wrongdoing in connection with the seized property, a claimant is entitled, at a minimum, to have his evidence of innocence answered. *Com. v. Younge*, 667 A.2d 739, 747 (Pa. Super. Ct. 1995). In the absence of evidence produced to rebut claimant's claim that he lawfully possessed the seized property, "permitting the Commonwealth to prevent its return amounts to little more than state-sanctioned theft." *Id.* Furthermore, when determining the weight of the claimant's evidence, stating simply that his story is unlikely, implausible, or incredible, is not a sufficient basis for rejecting the defense. *Com. v. \$51,406.66 U.S. Currency*, 1465 C.D. 2015, 2016 WL 3608783, at *5-6 (Pa. Commw. Ct. 2016) (remanding case because trial court's credibility determination did not make any specific findings of fact as to whether claimant satisfied his burden of proof regarding innocent owner defense).

The Superior Court in *Commonwealth v. Giffin* faced similar facts as this case. 595 A.2d at 101. In *Giffin*, the claimant pleaded guilty to possession of marijuana. *Id.* at 23. The Commonwealth subsequently seized \$1,266.00 in cash found in the same room as claimant's marijuana, which the court determined was in close proximity for the purpose of section 6801(a)(6)(ii)'s presumption. *Id.* The claimant testified that two days before her arrest, she cashed a welfare check in the amount of \$411.00. *Id.* The claimant further testified that her paramour's brother received \$27,000.00 as the settlement of a Social Security disability claim and gave \$1,000.00 to the claimant to purchase a car. *Id.* The court determined that the Commonwealth failed to sustain its burden of proof that it was "more likely than not" that the funds were derived from contraband or in violation of the Controlled Substance Act. *Id.* The court observed that the record evidence established that the cash came from legitimate sources: the claimant's welfare check and a SSDI settlement. *Id.* The court found no reason to disregard the produced documents and witness corroboration. *Id.* As a result, the Superior Court overturned the forfeiture. *Id.* at 29.

As the Superior Court did in *Giffin*, this Court should overturn the forfeiture determination because Falette satisfied the innocent owner defense as a matter of law. As in *Giffin*, Falette provided documentation to authenticate the source of the

cash by including his checks with his initial pleading, and there is nothing in the record that would undermine any of his evidence that he lawfully owned the cash.

Regardless of the wisdom of Falette's storing money in a car owned by his long-time friend, his testimony and documentary evidence establish that he was "more likely than not" the owner of the cash, and that he lawfully acquired it. Falette therefore satisfied his burden of proof under the innocent owner defense, and the burden shifted to the Commonwealth to provide specific facts to establish a nexus between the cash and drug trafficking.

The Commonwealth failed to provide specific facts or detailed objective reasoning to support the forfeiture, in violation of established precedent. The trial court stated that it found Falette's "explanation to be both illogical and devoid of credibility" because "the money was "neither easily accessible nor was it openly stored for showing off to his friends," was placed in his long-time friend's vehicle, and therefore was inconsistent with Falette's stated objective of showing off the money to his friends. The trial court provided no other facts to support its denial of Falette's innocent owner defense.

The lower court's reasoning is insufficient as a matter of law because it does not provide a detailed factual basis for its decision. *See \$51,406.66 U.S. Currency*, 2016 WL 3608783 at *5-6 (holding that a court simply finding that claimant's account of events is unlikely, implausible, or incredible, is insufficient as a matter

of law); *1997 Chevrolet*, 106 A.3d at 870 (providing that the trial court must identify specific circumstances making it reasonable to reject the innocent owner defense); *see also Freeman*, 142 A.3d at 164 (remanding case to trial level for more detailed analysis of claimant’s evidence that he was an innocent owner). The “inconsistency” pointed to by the trial court may cast doubt on the soundness of Falette’s decision to store the money in a car, but the trial court offered no explanation as to why this inconsistency sufficed to rebut Falette’s proof that the money was his, and that it came from lawful sources.

In sum, the lower court committed legal error in holding that Falette had not satisfied his burden to prove by a preponderance of the evidence that he was the innocent owner of the cash. The Commonwealth offered no evidence at all to counter Falette’s proof, and the trial court failed to identify specific facts or detailed reasoning for rejecting Falette’s innocent owner defense. This Court should reverse the order of forfeiture, making clear that courts may not lightly reject a property owner’s proof of innocence.

CONCLUSION

For the foregoing reasons, this Court should overturn the ruling of the lower court. Absent a reversal, the statutory presumption and innocent owner defenses are likely to continue to be misapplied to deprive many more innocent owners of

their property without meaningful safeguards, fueling a civil forfeiture machine that has strayed far from its purpose and allowed abuses to thrive unchecked.

Respectfully submitted,

Date: January 23, 2017

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CERTIFICATION OF COMPLIANCE

Pursuant to Rules 531(b)(3) and 2135(d) of the Pennsylvania Rules of Appellate Procedure, I, Patrick M. Hromisin, hereby certify that the foregoing Brief of ACLU of Pennsylvania as *Amicus Curiae* complies with the applicable word count limit. This certificate is based on the word count of the word processing system used to prepare the brief.

Date: January 23, 2017

/s/ Patrick M. Hromisin _____
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CERTIFICATE OF SERVICE

I, Patrick M. Hromisin, hereby certify that I caused the foregoing Brief of ACLU of Pennsylvania as *Amicus Curiae* upon the following counsel of record via the Court's electronic filing system or United States mail.

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