No. 11-817

In The Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

CLAYTON HARRIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The ability of the government to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates cases to defend the property rights of individuals and files *amicus curiae* briefs in relevant cases, including *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), *Alvarez v. Smith*, 558 U.S. 87 (2009), *Bennis v. Michigan*, 516 U.S. 442 (1996), and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Additionally, IJ produces high-quality, original research on issues related to property rights, including civil forfeiture.

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. All parties in this case have consented to the filing of this *amicus* brief.

In filing this *amicus* brief in support of Respondent, IJ urges this Court to affirm the Florida Supreme Court's decision, which properly held that the government "may establish probable cause by demonstrating that the officer had a reasonable basis for believing the [narcotics-detection] dog to be reliable based on the totality of the circumstances." *Harris v. State*, 71 So. 3d 756, 758 (Fla. 2011). If this Court overturns the decision of the Florida Supreme Court, and instead adopts the rule advocated by Petitioner – that an officer's perception of a positive dog alert establishes probable cause *per se* – law enforcement officials will be able to seize and forfeit property with nothing more than an assertion that the dog alerted to illegal substances. In light of IJ's original research demonstrating the perverse financial incentives underlying civil forfeiture and the number of erroneous alerts caused by handler miscuing, this *per se* rule would severely harm the property rights of innocent owners by triggering onerous civil-forfeiture proceedings.

SUMMARY OF ARGUMENT

Amicus IJ files this brief to draw attention to the consequences that this Court's ruling would have on another area of the law, civil forfeiture, in which narcotics-detection dogs are also used and the probable-cause standard also applies.

In urging reversal of the Florida Supreme Court's decision, Petitioner advocates a *per se* rule that a police officer's perception of an alert by a narcotics-detection dog establishes probable cause when the officer simply claims the dog is "trained" or "certified." Petitioner's *per se* rule conflicts with well-established Fourth Amendment precedent that the probable-cause determination is a case-specific analysis based on the totality of circumstances.

Moreover, a *per se* rule threatens the property rights of innocent owners by triggering onerous civil-forfeiture proceedings based solely on an officer's indication that a dog "alerted." Although the pending case occurs in the criminal context, any ruling as to when an alert by a narcotics-detection dog establishes probable cause to search will necessarily apply in the context of civil forfeiture because the probable-cause standard is the same in both contexts. Under the rules of civil forfeiture, law-enforcement officers may seize property if there is probable cause to believe that the property is linked to criminal activity. Thus, this Court's holding as to what evidence is necessary to establish the reliability of a narcotics-detection dog and its handler will apply not only to determine whether there is probable cause to search, arrest, or seize under criminal law, but also will determine the legality of seizures and forfeitures in the civil context, in which constitutional safeguards are more circumscribed than those afforded to criminal defendants.

Modern civil-forfeiture laws represent one of the most serious assaults on private-property rights

today. Divorced from its original justifications in seizing contraband or obtaining jurisdiction over admiralty and piracy crimes, today's civil-forfeiture laws have expanded dramatically in scope and allow law enforcement to retain most of the forfeiture proceeds. By giving law-enforcement officials a direct financial stake in generating forfeiture funds, civil forfeiture has skewed legitimate law-enforcement objectives into a profit-seeking enterprise. The explosion of civil forfeitures under federal and state law has led to the self-financing of law-enforcement agencies, creating a separation-of-powers problem and resulting in systemic abuse, including the improper use of narcotics-detection dogs to seize cash, cars, and other property, even when there is no evidence of criminal wrongdoing.

In light of this background, narcotics-detection dogs and their handlers cannot be viewed as inherently unbiased, reliable detectors of drugs, as Petitioner asserts. The profit incentive underlying civil forfeiture and the potential for handler miscuing warrant a case-by-case determination as to whether the particular narcotics-detection dog and handler are reliable and whether, under all of the circumstances, there is probable cause.

ARGUMENT

Increasingly, law-enforcement officials have been using narcotics-detection dogs to establish probable

cause not only for criminal searches, but also to seize and ultimately keep cash, cars, and other property under federal and state civil-forfeiture laws. In light of this trend, this brief addresses how relying solely on a positive dog alert to establish probable cause threatens property rights of innocent owners.

Part I illustrates why a *per se* rule that an officer's perception of a positive dog alert by itself establishes probable cause conflicts with this Court's Fourth Amendment jurisprudence.

Part II details how, untethered from its original justifications, modern civil-forfeiture laws represent one of the most serious assaults on private property rights today. By allowing law enforcement to retain forfeiture proceeds, modern civil-forfeiture laws create a perverse financial incentive to seize and forfeit property. Inherently, this system of "policing for profit" leads to the self-financing of law-enforcement agencies, violating separation-of-powers principles and creating systemic abuse.

In light of this background, Part III examines how allowing police to seize and profit from property with nothing more than an officer's perception of a positive dog alert threatens the property rights of innocent owners.

I. Adopting a *Per Se* Rule That an Officer's Perception of a Positive Alert by a "Trained" or "Certified" Narcotics-Detection Dog Establishes Probable Cause Conflicts with Well-Established Fourth Amendment Precedent.

As a threshold matter, unless expressly limited to the criminal context, this Court's ruling would necessarily apply to civil forfeiture. Under the rules of civil forfeiture, police may seize property if there is probable cause to believe that the property is linked to criminal activity. Probable cause in the context of civil forfeiture is the same standard applied to determine the legality of arrests, searches, and seizures in criminal law. *See* 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 11.03[4] (2012) (collecting cases); *see also United States v. $242,484.00*, 389 F.3d 1149, 1160 (11th Cir. 2004) (*en banc*); *id*. at 1151 (noting that "the probable cause issue in this [civil forfeiture] case [was] important enough for *en banc* review because of its implications for search and seizure cases").[2] Indeed, much of the

[2] *See also United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990) ("Probable cause [ ] is tested by the same criteria used to determine whether probable causes exists for a valid search and seizure: whether the government has provided a reasonable ground for believing that the house was used for illegal purposes."); *United States v. Thomas*, 913 F.2d 1111, 1114 (4th Cir. 1990) ("'Probable cause' for the purpose of forfeiture proceedings is the same standard used in search and seizure cases.").

jurisprudence related to narcotics-detection dogs involves forfeiture of cash, vehicles, or other property.[3] In some states[4] and even under some federal statutes,[5] a showing of probable cause alone will support forfeiture.

Correctly applying this Court's precedent, the Florida Supreme Court held that the government may fulfill its burden to establish probable cause for a warrantless search "by demonstrating that the officer had a reasonable basis for believing the [narcotics-detection] dog to be reliable based on the totality of circumstances." *Harris v. State*, 71 So. 3d 756, 758 (Fla. 2011). Accordingly, it held that in determining whether there is probable cause, a trial court must consider the following circumstances: training and certification records along with an explanation of those records; field-performance records; the experience and training of the dog's handling officer; and "any other objective evidence known to the officer

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[3] *See, e.g.*, 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 4.03[3][b] (2012) (describing forfeiture cases premised on a narcotics-detection dog's "alert" to currency).

[4] *See* Marian R. Williams, Ph.D., Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D. & Scott Bullock, POLI¢ING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 22 (2010) (depicting in Table 2 the standard of proof required under state forfeiture laws), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf [hereinafter POLI¢ING FOR PROFIT].

[5] Most forfeiture statutes under Title 19 of the U.S. Code allow forfeiture of property based solely on a showing of probable cause.

about the dog's reliability in being able to detect the presence of illegal substances." *Id*. at 759.

In urging reversal of the Florida Supreme Court's decision, Petitioner advocates a *per se* rule that a police officer's perception of an alert by a narcotics-detection dog establishes probable cause when the officer claims the dog is "trained" or "certified" – notwithstanding the facts that it is the government's duty to demonstrate probable cause and that there is no meaningful way to assess a claim of "training" or "certification" without underlying records because there is no standardized state program for training or certification. Petitioner's *per se* rule conflicts with well-established Fourth Amendment precedent establishing a totality-of-the-circumstances approach.

On numerous occasions, this Court has offered guidance on the meaning of probable cause.[6] In a

[6] *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (describing probable cause as "a practical, common-sense decision whether, given all the circumstances . . . including the 'veracity' and 'basis of knowledge' of [any] hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place"); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (observing that probable cause "does not deal with hard certainties, but with probabilities"); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (characterizing probable cause as "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act"); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (defining probable cause as "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and

(Continued on following page)

unanimous decision, this Court observed that "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal citations and quotation marks omitted). This Court has recognized that this "long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" *Id*. at 370 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Repeatedly, this Court has eschewed rigid, bright-line rules for assessing probable cause. In adopting a totality-of-the-circumstances approach for determining whether an informant's tip provided probable cause, this Court emphasized that:

> [P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. . . . Rigid legal rules are ill-suited

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destruction"); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (Marshall, C.J.) ("[T]he term 'probable cause,' according to its usual acceptation, means less evidence which would justify condemnation").

> to an area of such diversity. One simple rule will not cover every situation.

Illinois v. Gates, 462 U.S. 213, 232 (1983) (internal citations and quotation marks omitted). Additionally, this Court has recognized the importance of corroborating information obtained from others "by independent police work." *Id*. at 241.

Contravening centuries of jurisprudence, Petitioner and its *amici* urge this Court to adopt a *per se* rule that a positive alert by a "trained" or "certified" narcotics-detection dog, standing alone, is sufficient to establish probable cause, irrespective of what "trained" or "certified" actually means. *See, e.g.*, Pet'r's Br. 16, 19-20. Aside from raising the specter of mini-trials, Petitioner offers no justification for jettisoning the well-established "totality-of-the-circumstances" framework. To the contrary, just like informants' tips, dog alerts "come in many shapes and sizes," from many different kinds of dogs, and interpreted by many different kinds of handlers – rendering such a rigid legal rule ill-suited. Furthermore, the fact that training programs and certification programs vary greatly warrants a case-by-case approach. *See Harris*, 71 So. 3d at 767 ("[T]here is no uniform standard in [Florida] or nationwide for an acceptable level of training, testing, or certification for drug-detection dogs."). "In the absence of a uniform standard, the reliability of the dog cannot be established by demonstrating only that a canine is trained and certified." *Id*. at 768; *see also* Resp't's Br. 45-46.

Moreover, in cases in which the dog alerted to residual odor rather than any actual drugs present, allowing a positive alert to establish probable cause would conflict with the requirement that the probable cause be particularized. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."). Precisely because a dog's keen sense of smell allows it to detect residual odors "at extraordinarily low concentrations," Pet'r's Br. 16, the requirement of particularity is not met because it is not reasonable to believe that the residual odor is tied to the particular person, or in the case of civil forfeiture, to believe that the particular car, cash, or other property had a substantial connection to the residual odor of drugs.

Contrary to Petitioner's suggestion, *see* Pet'r's Br. 19-20, this Court has never recognized that an alert by a narcotics-detection dog, standing alone, establishes probable cause. Petitioner's reliance on *dicta* by a plurality of this Court in a case involving the "discrete category of airport encounters" is misguided. *See Florida v. Royer*, 460 U.S. 491, 505-06 (1983) (opining that a positive alert by a "trained dog[ ] to detect the presence of controlled substances in luggage" in an international airport "would have resulted in [the defendant's] justifiable arrest on probable cause") (plurality opinion). The plurality was not suggesting that the dog alert, by itself, constituted probable cause. Read in context, the plurality was

suggesting that probable cause would be supported by the hypothetical dog alert along with all the other previously known facts giving rise to reasonable suspicion – *i.e.*, a "nervous young man with two American Tourister bags paid cash for an airline ticket to a 'target city' . . . under an assumed name" and proffered an explanation that did not satisfy the officers. *Id*. at 507.

Indeed, in a case cited by Petitioner, the Eleventh Circuit provides a good model of how the totality-of-circumstances framework should be applied to determine probable cause in the context of a civil-forfeiture action involving a trained narcotics-detection dog. In *United States v. $242,484.00*, 389 F.3d 1149 (11th Cir. 2004) (*en banc*), the federal government sought civil forfeiture of cash seized from an airplane passenger by the Drug Enforcement Agency ("DEA"). In affirming the district court's finding that, under the totality of the circumstances, there was probable cause to believe that the cash was traceable to illegal drug transactions, the appeals court relied on all of the following facts:

- The sheer quantity of cash – nearly a quarter of a million dollars in small bills, weighing 40 pounds – suggested an illegitimate enterprise because other means of transporting the money (wiring, obtaining a cashier's check, or simply exchanging the cash into larger denominations, thereby reducing the weight to merely five pounds) would have generated a currency-transaction report;

- The cash was bundled in rubber bands, wrapped in cellophane and Christmas wrapping paper, and stuffed into a backpack, consistent with methods drug couriers routinely use to conceal currency;
- The passenger's route from Miami to New York was a common drug-courier route, and the passenger had changed her return date twice in two days;
- Although the passenger claimed she picked up the money on behalf of her brother for his import/export business, she was unable to identify the people who gave her the money, where she met them, where she stayed in New York during her four-day trip, and gave conflicting reasons for her travel;
- No one – not the people who gave the passenger the money, her brother, or the import/export business she claimed the money belonged to – ever stepped forward to claim the money in the two years and nine months the case was pending;
- The DEA database flagged the name of the import/export business for "possible money laundering"; and
- Rambo, a trained narcotics-detection dog, alerted to the passenger's bag.

Thus, independent police work corroborated Rambo's positive alert. In contrast, the rule urged by Petitioner would have allowed the government to seize nearly a quarter of a million dollars based on nothing more than the last fact, even though there was conflicting testimony regarding how Rambo alerted. Far from being unworkable, the traditional totality-of-the-circumstances approach better protects innocent owner's property rights while serving legitimate law-enforcement objectives.

In addition to independent police work, the totality of the circumstances necessarily includes the narcotics-detection team's performance in the field. Federal and state courts have considered field performance as an important factor in assessing whether a positive alert by a narcotics-detection dog established probable cause.[7] Petitioner's approach, however, would preclude courts from even considering how the particular narcotics-detection team actually performed in the field, providing incentives for the government to not maintain field-performance records. *See* Resp't's Br. 36-42.

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[7] *See, e.g.*, *United States v. Limares*, 269 F.3d 794, 797-98 (7th Cir. 2001); *United States v. Diaz*, 25 F.3d 392, 395-96 (6th Cir. 1994); *United States v. Ligenfelter*, 997 F.2d 632, 639 (9th Cir. 1993); *United States v. Outlaw*, 134 F. Supp. 2d 807, 810-12 (W.D. Tex. 2001); *State of Tennessee v. England*, 19 S.W.3d 762, 768-69 (Tenn. 2000); *State of Kansas v. Barker*, 850 P.2d 885, 891-93 (Kan. 1993).

In addition to conflicting with centuries of jurisprudence by this Court, a *per se* rule that an officer's perception of a dog alert, by itself, establishes probable cause would also trigger onerous civil-forfeiture proceedings, thereby harming the property rights of innocent owners. But before addressing this harm, it is first necessary to examine modern civil-forfeiture laws and how they operate to give law enforcement a direct financial incentive to seize property.

II. Civil-Forfeiture Laws Constitute One of the Most Serious Assaults on Private-Property Rights Today.

"[T]he most basic function of any government [is] to provide for the security of the individual and of his property." *Gates*, 462 U.S. at 237 (quotation marks and citation omitted). A free society must guarantee the security of both the individual and his property because an individual secure in his person, but not in his property, is not truly free. As this Court has recognized, "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993); *see also id*. at 81 (Thomas, J., concurring in part and dissenting in part) (stating that property rights "are central to our heritage"). Consequently, private property is one of our nation's most cherished principles, as reflected in our Constitution. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 949 (2012) ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred

simply to the 'right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous.").

Yet, through modern civil-forfeiture laws, government at all levels has contributed to endangering the security of the individual and his property. Under federal and state civil-forfeiture laws, law-enforcement officials can seize and keep property suspected of involvement in criminal activity. Unlike criminal forfeiture, under civil forfeiture, property owners need not be found guilty of a crime – or even charged of any wrongdoing – to permanently lose their cash, car, home, or other property. And because they are civil proceedings, most of the constitutional protections afforded to criminal defendants do not apply to property owners in civil-forfeiture cases.

Perhaps the most troubling aspect of modern civil-forfeiture laws is the profit incentive at their core. The overriding goal for both prosecutors and police should be the fair and impartial administration of justice. However, by allowing law enforcement to retain forfeiture proceeds, civil-forfeiture laws dangerously shift law-enforcement priorities toward the pursuit of property and profit. By distorting law-enforcement priorities and creating agencies funded from outside the legislative process, federal and state forfeiture systems have eviscerated accountability and led to systemic abuse.

A. Civil forfeiture has expanded dramatically and become unmoored from its original justifications as envisioned by the founding generation.

Although civil-forfeiture laws have been on the books since the nation's founding, in stark contrast to modern civil-forfeiture laws, these early laws were limited in scope and justification. For example, early laws authorizing forfeiture were based on the unquestioned ability of the government to seize contraband, in which no property rights were vested. Contraband included not only *per se* illegal goods and stolen goods, but also goods that were concealed to avoid paying required customs duties, which at the time provided 80 to 90 percent of the finances for the federal government.[8] *See* Act of July 31, 1789, 1 Stat. 29, 43 (providing that all "goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited"). Additionally, forfeiture of noncontraband items was justified only by the practical necessities of enforcing admiralty or piracy laws. As an *in rem* proceeding, an action against the property itself, forfeiture allowed courts to obtain jurisdiction over property when it was virtually impossible to seek justice against property owners guilty of admiralty

[8] James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last?* 62 CORNELL L. REV. 768, 782 n. 86 (1977).

or piracy violations because they were overseas or otherwise outside the court's jurisdiction.[9]

Although this Court permitted the government to expand its forfeiture power during the Civil War,[10] civil forfeiture remained a relative backwater in American law throughout most of the 20th century. During the Prohibition Era, the federal government expanded the scope of its forfeiture authority beyond *per se* contraband to cover automobiles or other vehicles transporting illegal liquor. However, the forfeiture provision of the National Prohibition Act was considered "incidental" to the primary purpose of "destroy[ing] the forbidden liquor in transportation." *Carroll v. United States*, 267 U.S. 132, 155 (1925).

In stark contrast, modern civil-forfeiture laws, which trace their origins to the government's war on drugs, differ from their predecessors in three key respects. First, modern civil-forfeiture laws are much broader in scope, covering not only illegal drugs and any conveyance used to transport them, but all manner of real and personal property connected to the

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[9] *See, e.g.*, *The Brig Malek Adhel*, 43 U.S. 210, 233 (1844) (justifying forfeiture of innocent owner's vessel under piracy and admiralty laws because of "the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong") (emphasis added); *The Palmyra*, 25 U.S. 1, 14 (1827) (revenue laws); *United States v. The Schooner Little Charles*, 1 Brock. 347, 354 (C.C.D.Va. 1819) (Marshall, C.J.) (embargo laws).

[10] Leonard W. Levy, A LICENSE TO STEAL. THE FORFEITURE OF PROPERTY 51-57 (1996).

alleged criminal activity.[11] Moreover, Congress and state legislatures have expanded forfeiture beyond alleged instances of drug violations to include myriad crimes at the federal and state levels. Today there are more than 400 federal forfeiture statutes relating to a number of federal crimes, from environmental crimes to the failure to report currency transactions.[12] Further, all states have statutory provisions for some form of civil forfeiture.[13]

Second, in contrast to most of American history in which the proceeds from civil forfeitures went to a general fund to benefit the public at large, modern civil-forfeiture laws allow law-enforcement officials to keep most of the forfeiture proceeds. In 1984, Congress amended parts of the Comprehensive Drug Abuse and Prevention Act of 1970 to allow federal law-enforcement agencies to keep a portion of the forfeiture proceeds in a newly created Assets Forfeiture Fund.[14] Initially, any forfeiture proceeds exceeding

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[11] *See, e.g.*, 21 U.S.C. § 881(a)(7) (subjecting to forfeiture all real property "used, or intended to be used, in any manner or part, to commit, or facilitate the commission of" a drug crime).

[12] *See* Asset Forfeiture and Money Laundering Section, U.S. Dep't of Justice Criminal Div., SELECTED FEDERAL ASSET FORFEITURE STATUTES (2006), *available at* http://www.justice.gov/criminal/foia/docs/afstats06.pdf.

[13] *See generally* Steven L. Kessler, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE (2012) (discussing each state's civil-forfeiture provisions).

[14] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

$5 million that remained in the Assets Forfeiture Fund at the end of the fiscal year were to be deposited in the Treasury's general fund.[15] Moreover, the government's use of proceeds in the Assets Forfeiture Fund was restricted to a relatively limited number of purposes, such as paying for forfeiture expenses like storing the property or giving awards for information that led to forfeitures.[16] However, subsequent amendments eliminated both the $5-million cap and dramatically broadened the scope of expenses the government could pay for with the Assets Forfeiture Fund, including purchasing vehicles and paying overtime salaries.[17] In short, after the 1984 amendments, federal agencies were able to retain and spend forfeiture proceeds – subject only to very loose restrictions – giving them a direct financial stake in generating forfeiture funds.[18] Many states followed the federal government's example by amending their civil-forfeiture laws to give law-enforcement agencies a direct share of forfeited proceeds. Law-enforcement

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[15] *Id*. § 310, 98 Stat. at 2053 (previously codified at 28 U.S.C. § 524(c)(7)).

[16] *Id*. § 310, 98 Stat. at 2052 (previously codified at 28 U.S.C. § 524(c)(1)).

[17] 28 U.S.C. § 524(c)(1)(F)(i), (c)(1)(I).

[18] Although Congress enacted the Civil Asset Forfeiture Reform Act in 2000, none of those reforms changed how forfeiture proceeds are distributed or otherwise mitigated the direct pecuniary interest law-enforcement agencies have in civil forfeitures. *See* Pub. L. No. 106-185, 114 Stat. 202 (2000).

agencies in 42 states receive some or all of the civil-forfeiture proceeds they seize.[19]

Third, by allowing law-enforcement officials to retain forfeiture proceeds, federal and state forfeiture laws create a perverse financial incentive to maximize the seizure of forfeitable property. Consequently, unlike their predecessors, under modern civil-forfeiture laws, forfeiture of property is often the primary purpose of the seizure. As the former chief of the federal government's Asset Forfeiture and Money Laundering Offices observed, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."[20] Indeed, according to a July 2012 report by the United States Government Accountability Office ("GAO"), one of the three primary goals of the Assets Forfeiture Fund is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."[21]

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[19] POLI¢ING FOR PROFIT at 17 (2010) (depicting in Table 1 the percentage of forfeiture proceeds distributed to law enforcement in each state).

[20] Richard Miniter, *Ill-Gotten Gains*, REASON, Aug. 1993, at 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), *available at* http://reason.com/archives/1993/08/01/ill-gotten-gains.

[21] U.S. Gov't Accountability Office, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 6

(Continued on following page)

In sum, no longer is civil forfeiture tied to seizing contraband or the practical difficulties of obtaining personal jurisdiction over an individual. Unmoored from its historical limitation as a necessary means of enforcing admiralty and piracy laws, the forfeiture power has not only grown into a commonly used weapon in the government's crime-fighting arsenal, but morphed into a profit-seeking venture for the government.

B. The ability of law enforcement to retain civil-forfeiture proceeds inexorably has led to "policing for profit."

As a direct result of federal and state law incentivizing law-enforcement officials to seize property under civil forfeiture, there has been an explosion of forfeiture revenue. First, federal forfeitures have grown exponentially. Second, state law-enforcement agencies have been getting more and more money through the federal equitable-sharing program, which pays state agencies with up to 80 percent of the forfeiture proceeds for referring civil forfeitures to federal authorities. Finally, not only do state agencies directly benefit from forfeitures under equitable sharing, but forfeitures conducted under their own state laws also are on the rise.

(2012), *available at* http://www.gao.gov/assets/600/592349.pdf [hereinafter *GAO-12-736 Report*].

The U.S. Department of Justice's Assets Forfeiture Fund, the largest of the federal government's forfeiture funds, illustrates how federal forfeitures have grown exponentially. In 1986, the second year after it was created, the fund took in $93.7 million in proceeds from forfeited assets. By 2008, the fund for the first time in history topped $1 billion in net assets, *i.e.*, forfeiture proceeds free and clear of debt obligations and now available for use by law enforcement. And from fiscal years 2003 to 2011, the fund's revenues more than tripled, growing from $500 million in FY 2003 to $1.8 billion in FY 2011.[22]

Second, payments under the federal equitable-sharing program have also grown dramatically. Under this program, state and local law enforcement share in the proceeds of federal civil-forfeiture actions they refer to federal authorities, and can use those proceeds as they see fit to support state law-enforcement activities.[23] According to the GAO, in the last nine years, equitable-sharing payments to state and local law-enforcement agencies have more than doubled, growing from $218 million in FY 2003 to

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[22] *Id*. at 11.

[23] *See generally* Dick M. Carpenter II, Ph.D., Larry Salzman & Lisa Knepper, INEQUITABLE JUSTICE: HOW "EQUITABLE SHARING" ENCOURAGES LOCAL POLICE AND PROSECUTORS TO EVADE STATE CIVIL FORFEITURE LAW FOR FINANCIAL GAIN (2011), *available at* http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf (analyzing federal equitable-sharing program) [hereinafter INEQUITABLE JUSTICE].

$445 million in FY 2011.[24] Notably, except for 2007, equitable-sharing payments outpaced payments to compensate victims.[25] Indeed, the GAO noted that when compared with Justice Department grant programs, equitable sharing is one of the largest "programs providing funds to state and local law-enforcement activities."[26] According to state and local law-enforcement officials interviewed by the GAO:

> the equitable sharing program is extremely important because it helps fund equipment, training and other programs that they may otherwise not be able to afford. For example, one local law enforcement agency stated that salaries make up 96 percent of its annual budget. As a result, equitable sharing dollars allow them to purchase equipment they could not otherwise buy with the limited available annual budget.[27]

In fiscal year 2011, Florida was the third-largest recipient of equitable-sharing payments, receiving more than $38 million (surpassed by New York which received almost $48.5 million and California which received more than $79 million).[28]

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[24] *GAO-12-736 Report* at 15.

[25] *Id*. at 15 tbl. 1.

[26] *Id*. at 15.

[27] *Id.*

[28] *Id*. at 44 app. I fig. 7.

As significant as these statistics are, they underestimate the extent of the equitable-sharing program because the Department of Justice's Assets Forfeiture Fund is not the only source for equitable-sharing funding.[29] State and local agencies can also secure equitable-sharing revenue from other federal agencies like the Department of Treasury. Through public-records requests, *amicus* IJ was able to obtain records for annual equitable-sharing reports at the agency level for nine sample states, including Florida. These records show not only that equitable sharing is on the rise, but that the revenue generated is much more than what the Assets Forfeiture Fund reveals. For example, in 2010, Florida agencies received $23,878,690 in equitable-sharing payments from the Justice Department's Assets Forfeiture Fund, but an additional $17,861,089 from all other sources.[30]

Worse, under equitable-sharing programs, federal authorities can "adopt" state forfeitures involving a violation of federal law and thereby apply relatively lax federal standards instead of the applicable state standards.[31] Thus, when state laws protect property rights by making civil forfeiture more difficult or restricting forfeiture proceeds from being funneled back to seizing authorities, equitable sharing creates

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[29] INEQUITABLE JUSTICE at 10.

[30] Information received on April 29, 2011 from Rena Y. Kim, Chief, Freedom of Information Act/Privacy Unit, Criminal Division, Dep't of Justice, available on CD-ROM from IJ.

[31] INEQUITABLE JUSTICE at 5.

a loophole that frustrates more-stringent state standards. For example, Nebraska's Constitution requires that half of forfeited funds go to public schools.[32] To circumvent this requirement, law-enforcement agencies ask federal prosecutors to "adopt" their seizures under the federal equitable-sharing program. Under this program, the agency keeps 80 percent of the proceeds, the federal government retains 20 percent, and the Nebraska public schools get nothing. When a state senator introduced an amendment to require that those funds also be shared with schools, both state and federal law-enforcement officials fought against it.[33]

A study published last year confirms such anecdotal reports that equitable sharing encourages local law enforcement to evade stricter state forfeiture laws.[34] The study first categorized the civil-forfeiture laws of all 50 states according to the following three dimensions: (1) profit motive, or how forfeiture proceeds are distributed; (2) the burden placed on the innocent owner to claim the property; and (3) the standard of proof that the government bears to

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[32] NEB. CONST. art. VII, § 5.

[33] Patrick Strawbridge, *Police Oppose Drug-Cash Plan*, THE OMAHA WORLD-HERALD, May 1, 1999, at 57.

[34] Jefferson E. Holcomb, Ph.D., Tomislav V. Kovandzic, Ph.D. & Marian R. Williams, Ph.D., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. OF CRIM. JUSTICE 273 (2011) [hereinafter *Civil Asset Forfeiture*].

demonstrate that the property is forfeitable.[35] The study then examined how these three dimensions of state civil-forfeiture laws correlate with equitable-sharing payments to local law-enforcement agencies.[36] The study concluded that all three aspects of state civil-forfeiture law independently, and in concert, impact the size of equitable-sharing payments.[37] Specifically, states with tougher forfeiture laws – laws that either decrease the profit motive, place the burden to show guilt on the government, or require higher standards of proof for forfeiture – receive more equitable-sharing payments.[38] Thus, state laws making forfeiture more difficult and less rewarding lead to greater use of the federal equitable-sharing loophole. *Amicus* IJ graded and ranked states according to their state forfeiture laws and how much they evaded their state laws through federal equitable sharing.[39] Florida was one of the ten worst states, having both bad state laws and considerable participation in equitable sharing, earning an overall "D" grade.[40]

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[35] *Id*. at 276-78; *see also* INEQUITABLE JUSTICE at 4-5 (depicting states' forfeiture laws in Tables 1 through 3).

[36] *Civil Asset Forfeiture* at 279-82.

[37] *Id*. at 282-83.

[38] *Id.* at 283.

[39] POLI¢ING FOR PROFIT at 53; INEQUITABLE JUSTICE at 9 (depicting in Table 6 each state's forfeiture law grades, evasion grades, and final grades).

[40] POLI¢ING FOR PROFIT at 53.

Finally, although data on civil forfeitures under state law are sparse, the data IJ has obtained from state reporting requirements and federal sources demonstrates that forfeitures under state law have also grown dramatically. For example, in Florida, law-enforcement officials receive 85 percent of the funds generated from civil forfeitures under state law.[41] As detailed above, this strong profit incentive would lead one to predict that law-enforcement agencies in Florida will make substantial use of civil forfeiture at the state level, just as it does through equitable sharing. And this prediction is borne out by empirical evidence: In a mere three-year period from 2001 to 2003, Florida raked in more than $100 million in forfeitures under state law and anywhere from $16 million to $48 million per year in the 2000s through equitable sharing.[42]

C. The meteoric rise in forfeitures has skewed legitimate law-enforcement priorities, creating self-financing agencies and systemic abuse.

The exponential growth of federal and state forfeitures has led to self-financing law-enforcement

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[41] POLI¢ING FOR PROFIT at 53. In the majority of states, law-enforcement agencies keep 100 percent of forfeiture proceeds. *Id*. at 17.

[42] *Id.* at 53. These figures may overlap, as it is not clear whether Florida included equitable-sharing revenue in its response to freedom-of-information requests.

agencies that are no longer dependent on legislative appropriations and to systemic abuse. According to a survey of nearly 800 law-enforcement executives, nearly 40 percent reported that civil-forfeiture proceeds were a necessary supplement to their agency's budget.[43] At the federal level, the Department of Justice has urged its lawyers to increase their civil-forfeiture efforts so as to meet the Department's annual budget targets.[44]

The ability of law-enforcement agencies to self-finance contradicts the principle of separation of powers. As George Mason cautioned, "When the same man, or set of men, holds both the sword and the purse, there is an end of liberty."[45] Or, as a recent report observed:

> The dependency of police on public resources for their operations is an important check on police power. Self-generating revenues by the police through forfeiture potentially threatens the ability of popularly elected officials to constrain police activities.[46]

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[43] John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001).

[44] Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, 38 United States Attorneys' Bulletin 180 (1990).

[45] George Mason, *Fairfax County Freeholders' Address and Instructions to Their General Assembly Delegates* (May 30, 1783), *in* Jeff Broadwater, GEORGE MASON: FORGOTTEN FOUNDER 153 (2006).

[46] *Civil Asset Forfeiture* at 283.

The result, is that, increasingly, forfeiture funds "become[ ] off-the-books slush funds through which law enforcement agencies can self-finance, exempted from democratic controls."[47]

In some states law-enforcement agencies have flouted state reporting requirements intended to serve as a minimal check on forfeiture abuse.[48] And the potential for serious abuse is not just theoretical. Law enforcement's reluctance to give up forfeiture proceeds has led to illegality.[49] In November 2000, citizens of Utah passed an initiative requiring forfeiture proceeds to be deposited into the state's Uniform School Trust Fund.[50] Ignoring this law, prosecutors in three counties diverted nearly a quarter of a million dollars into their own accounts. Only under the threat of a lawsuit did the prosecutors capitulate. Subsequently, police and prosecutors persuaded the legislature to nullify the voter-approved initiative, so

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[47] Erin Norman & Anthony Sanders, FORFEITING ACCOUNTABILITY: GEORGIA LAW ENFORCEMENT'S HIDDEN CIVIL FORFEITURE FUNDS 1 (2011), *available at* http://www.ij.org/forfeiting-accountability-2.

[48] *Id*.

[49] *See, e.g.*, 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 7.02[2] (2012) (discussing conspiracy between Missouri law enforcement and Drug Enforcement Agency to thwart state law requiring judicial approval before federal government may adopt a state forfeiture case).

[50] Patty Henetz, *Prosecutors, Police Reluctantly Comply With Asset Seizure Law*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, July 17, 2003.

that all forfeiture proceeds were again directed to law enforcement.[51]

The lack of oversight has even led to the personal use of seized property. In 2003, top Tampa Bay police officers used seized cars for their own personal use.[52] The seized fleet consisted of some 42 cars, including a Lincoln Navigator, a Ford Expedition, and, Police Chief Bennie Holder's favorite, a $38,000 Chevy Tahoe. Forfeiture has also been abused to make highly questionable purchases:

- In Austin, Texas, running gear for the police department;
- In Fulton County, Georgia, football tickets for the district attorney's office;
- In Webb County, Texas, $20,000 for TV commercials for the district attorney's re-election campaign;
- In Albany, New York, over $16,000 for food, gifts and entertainment for the police department; and
- In Colorado, bomber jackets for State Patrol officers.[53]

Examples of forfeiture abuse include the use of narcotics-detection dogs. For example, in June 2012,

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[51] *Id*.

[52] Robyn E. Blumner, *Police too addicted to lure of easy money*, ST. PETERSBURG TIMES, Aug. 17, 2003, at D7.

[53] POLI¢ING FOR PROFIT at 18.

a group of troopers filed a lawsuit against the Nevada Highway Patrol and Las Vegas Metro Police alleging that the Patrol Commander conspired to use narcotics-detection dogs to systematically conduct illegal searches and seizures for financial benefit.[54] The complaint alleges that the narcotics-detection dogs were intentionally trained to respond to cues from their handlers and provide false alerts that they had detected drugs in the hopes of seizing property for forfeiture (which, incidentally, funded the entire dog program).[55]

Far from being cherry-picked examples of a few "bad apples" in law enforcement, these cases show that the potential for abuse is systemic because incentives matter. Just as private citizens are motivated by self-interest, so too are government officials.[56] Government officials attempt to maximize the size and budget of their agency, which will benefit everyone within the agency through higher salaries, greater job security, better equipment, and increased power and prestige. These incentives affect even the most well-intentioned law-enforcement officers.

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[54] Nicole Benson, *NHP Troopers Sue Department Over K-9 Program*, KLAS-TV, Jun. 26, 2012, *available at* http://www.8newsnow.com/story/18886948/2012/06/26/nhp-troopers-sue-department-over-k-9-program.

[55] *See also* Levy, *supra* note 11, at 2-7 (collecting examples).

[56] James Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT (1962) (discussing the universality of the self-interest axiom and its implications for public policy decision-making).

Because, in contrast to private citizens, government officials can use force to achieve their ends, it is a constant threat that those in positions of power will use that force to serve their own self-interest at the expense of the larger public. This concern reaches its zenith when government officials stand to benefit themselves by seizing private property.

By allowing law-enforcement agencies to retain proceeds, modern civil-forfeiture laws create perverse incentives to seize property first and ask questions later. Creating a self-financing system has led to systematic abuse, including using narcotics-detection dogs to seize and ultimately forfeit property.

III. Permitting a Finding of Probable Cause Based Solely on an Officer's Perception of a Positive Dog Alert Would Exacerbate Forfeiture Abuse, Threatening the Property Rights of Innocent Owners.

In light of how civil forfeiture creates perverse incentives to seize property first and ask questions later, overturning the Florida Supreme Court's decision and adopting a *per se* rule that a positive alert by a narcotics-detection dog establishes probable cause would severely undermine the property rights of innocent owners by dramatically expanding the ability of law enforcement to seize and forfeit property.

Petitioner's characterization of a narcotics-detection dog and its partner as a reliable, unbiased "divining rod" for drugs is unfounded. Moreover, if a

positive dog alert, by itself, provides probable cause to seize property, innocent owners will become ensnared in expensive and onerous proceedings in which they bear the burden of proving their innocence. A fluid approach to determining probable cause in the canine context, in line with this Court's precedent, would provide greater protection to innocent property owners and better serve legitimate law-enforcement objectives.

A. Narcotics-detection dogs and their handlers are not inherently unbiased, reliable "divining rods" for drugs.

Contrary to Petitioner's portrayal of narcotics-detection teams as unbiased,[57] the strong profit incentive underlying civil forfeiture detailed *supra* in Section II necessarily means that the police and their canine companions may be motivated by something other than legitimate law-enforcement objectives. Petitioner questions why law enforcement would want "to rely on a dog that serially fails to detect contraband." Pet'r's Br. 23. However, if a positive dog alert by itself provides probable cause to seize and forfeit property, it would not matter whether any contraband was actually found in terms of civil forfeiture, especially when police rely on a "residual odor"

[57] *See* Pet'r's Br. 23 ("Law enforcement interests, in other words, are naturally aligned with the interests of ensuring reliability.").

theory to provide probable cause that the item subject to forfeiture is linked to crime.

This Court has recognized that, even in the criminal context in which there is no underlying profit motive, law enforcement is not a completely unbiased venture, and therefore requires the protection of a neutral judicial officer:

> The essential protection of the warrant requirement of the Fourth Amendment . . . is in requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the *often competitive enterprise of ferreting out crime*.

Gates, 462 U.S. at 240 (quotations and citations omitted, alteration in original) (emphasis added). This observation is all the more true when police, who stand to financially benefit from the seizure through civil forfeiture, are the ones to make the probable-cause determination in the first instance, rather than a neutral, detached judicial officer.

In arguing that narcotics-detection dogs lack "ulterior objectives," Petitioner compares them to honest citizen informants. Pet'r's Br. 28 (citing *Gates*, 463 U.S. at 233). But this false parallel does not weigh in favor of the rule urged by Petitioner. This Court has never held that information provided by an honest citizen, by itself, establishes probable cause. Rather, this Court merely recognized that information from an honest citizen would not require

"rigorous scrutiny" because of the availability of criminal liability if the citizen had lied. *Gates*, 462 U.S. at 233-34 ("[I]f an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary."). Obviously, no such criminal liability attaches to the dog.

Moreover, numerous studies show there is a significant risk that the dog is alerting due to cues from the handler or residual odors, rather than the actual presence of drugs.[58] A University of California-Davis study led by neurologist and former dog handler Lisa Lit asked 18 professional dog handlers and their canine companions to complete two sets of four searches.[59] Some of the search areas contained decoy scents but none actually contained drugs; thus, any "alert" made by the dog had to be false. Before the searches, handlers were misinformed that some of the search areas might contain up to three target scents and that some targets would be marked by a piece of red paper. The findings showed that of the 144 searches, only 21 accurately produced no alerts.

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[58] *See generally* Br. of *Amicus Curiae* Nat'l Ass'n of Criminal Def. Lawyers, The Florida Ass'n of Criminal Def. Lawyers and the American Civil Liberties Union in Supp. of Resp't at 8-26 (discussing scientific studies of narcotics-detection dogs).

[59] Lisa Lit *et al*., *Handler beliefs affect scent detection dog outcomes*, 14 ANIMAL COGNITION 387 (2011); *see also Clever Hounds*, THE ECONOMIST (Feb. 15, 2011), http://www.economist.com/blogs/babbage/2011/02/animal_behaviour.

When handlers could see a red piece of paper, purportedly marking a target scent, their dogs were much more likely to have falsely alerted – alerting to 32 of a possible 36 alerts. Thus, an alert by a narcotics-detection dog may have more to do with the handler's expectations and desires than whether drugs are actually present.[60]

B. Triggering civil-forfeiture proceedings based on nothing more than a positive dog alert would threaten innocent owners' property.

If a positive dog alert, by itself, is all that is required to establish probable cause, law enforcement will be able to use civil forfeiture to take property such as cash and cars even when there is no other evidence of criminal wrongdoing. Given that more lax procedural requirements apply to civil forfeiture than criminal forfeiture, law enforcement often pursues the civil-forfeiture avenue. Indeed, 80 percent of persons whose property was seized by the federal government for forfeiture were never even charged

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[60] Radley Balko, *The Mind of a Police Dog: How misconceptions about dogs can lead to abuse of humans,* REASON (Feb. 21, 2011), http://reason.com/archives/2011/02/21/the-mind-of-a-police-dog ("When we think dogs are using their well-honed noses to sniff out drugs or criminal suspects, they may actually be displaying a more recently evolved trait: an urgent desire to please their masters, coupled with the ability to read their cues.").

with a crime.[61] And the vast majority of forfeitures never reach a courtroom.

The ability of property owners to reclaim seized property is meant to be a check on the government's forfeiture power. However, with lax standards of proof for the government and onerous burdens on owners, this ability is more illusory than real. After seizing the property, under federal law (and in most states) the government can have the property forfeited by showing that the property is more likely than not linked to a crime. In 14 states the standard is even less, requiring the government to show only probable cause. Once this minimal threshold is met, in most states and at the federal level, the burden is on the owner to prove their innocence, turning the American ideal of "innocent until proven guilty" on its head.

There are countless examples of police seizing large sums of cash based on nothing more than a positive dog alert.[62] For example, on January 7, 2009,

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[61] Henry Hyde, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? 6 (1995).

[62] Perhaps most egregiously, a drug task force in Brown County, Wisconsin, told Beverly Greer, whose son was arrested on drug charges, to bring the $7,500 in bail money in cash. After piecing together the bail money by visiting a series of ATMs and bringing it to the jail, Greer was informed that a narcotics-detection dog had alerted to the presence of drugs on the currency and that her money would be seized under state civil-forfeiture laws. Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families Bail Money*, THE HUFFINGTON

(Continued on following page)

Anthony Smelley, a 22-year-old college student, was driving on Interstate 70 from Detroit to his aunt's home in St. Louis when he was pulled over by Putnam County, Indiana Lt. Dwight Simmons for making an unsafe lane change and driving with an obscured license plate.[63] Lt. Simmons called in a K-9 unit which sniffed the car for drugs and positively alerted, indicating that drugs might be present. Accordingly, Lt. Simmons searched the car and patted down Smelley and seized a large roll of cash from his front pocket, totaling $17,500. Smelley, who had received a $50,000 settlement from a car accident, claimed he was carrying the money to buy a new car for his aunt.

Although no drugs were ever found in Smelley's car and the police never charged Smelley or his passengers with a drug-related crime, Putnam County initiated civil-forfeiture proceedings to confiscate the $17,500. Smelley's case was batted around the Indiana courts before finally being scheduled for trial on January 29, 2010. In the end, after more than a year elapsed before even having the opportunity to contest the seizure of his $17,500, Smelley had his money returned to him, without interest.

Similarly, Jerome Chennault was driving through Madison County, Illinois, on his way home to Nevada

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POST (May 20, 2012), http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html.

[63] Radley Balko, *The Forfeiture Racket*, REASON (Jan. 26, 2010), http://reason.com/archives/2010/01/26/the-forfeiture-racket.

after visiting his son in Philadelphia. Chennault was carrying $22,870 in cash to pay for a down payment on a home.[64] After being pulled over for "following too closely," police deployed a narcotics-detection dog to sniff his car. The dog alerted to the bag carrying Chennault's cash. Although no actual drugs were found in the car and Chennault was never charged with a crime, the dog alert was enough to allow police to seize Chennault's money for civil forfeiture. Over the next several months, Chennault traveled to Illinois at his own expense to contest the forfeiture. Eventually, Chennault won and his money was returned. But he was not reimbursed for his legal or travel expenses.

In light of the above examples and others,[65] it is no surprise that in practice, few property owners,

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[64] Radley Balko, *Illinois Traffic Stop of Star Trek Fans Raises Concerns About Drug Searches, Police Dogs, Bad Cops,* THE HUFFINGTON POST (Mar. 31, 2012), http://www.huffingtonpost.com/2012/03/31/drug-search-trekies-stopped-searched-illinois_n_1364087.html.

[65] *See, e.g.*, *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510 (Minn. 2007) (reviewing order of forfeiture of innocent landlord's cash kept in safe of apartment he had rented unknowingly to a drug dealer); *State of Utah v. Seventy-Three Thousand One Hundred Thirty Dollars United States Currency*, 31 P.3d 514 (Utah 2001) (reviewing order of forfeiture despite the fact that the government had stipulated that cash was not traced to any drug transactions); *In re Forfeiture of $18,000*, 471 N.W.2d 628 (Mich. Ct. App. 1991) (reviewing order of forfeiture where police seized money brought as bail after "alert" by narcotics-detection dog).

especially lower-income individuals, can meet the burdens of civil-forfeiture proceedings and often do not challenge seizures of their property. This is particularly true when law enforcement seizes property, the value of which would be greatly exceeded by the time, attorney fees, and other expenses necessary to contest the forfeiture. As a result, many property owners do not challenge the seizure and the government obtains the property by default.

Although dogs can serve as valuable investigative tools, they should not be the sole means to establish probable cause for a search. A rule watering down the probable-cause showing, in contravention of established Fourth Amendment precedent, would vastly expand the power of the law enforcement to seize, forfeit, and profit from the property of innocent owners.

CONCLUSION

As detailed above, the consequences of allowing an alert by a narcotics-detection dog, on its own, to establish probable cause extend beyond unconstitutional searches of criminal defendants. Unless expressly cabined to the criminal context, such a ruling would allow police to seize innocent owners' property for civil forfeiture. For the foregoing reasons, the

decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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