

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**NOS. 29 EAP 2015 and 30 EAP 2015**

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**Commonwealth of Pennsylvania,  
Appellant**

**v.**

**Real Property and Improvements Known as  
416 S. 62<sup>nd</sup> Street, Philadelphia, PA 19143 and  
1997 Chevrolet and Contents Seized From James Young,**

**Appeals of: Elizabeth Young**

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**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF  
THE COMMONWEALTH OF PENNSYLVANIA**

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**Appeal From the December 17, 2014 Order of the  
Commonwealth Court of Pennsylvania at Docket Nos.  
1990 CD 2012 and 1995 CD 2012 Reversing the May 1,  
2012 Orders of the Philadelphia Court of Common Pleas  
Granting The Commonwealth of Pennsylvania's Petitions  
For Forfeiture At Docket Nos. CP-51-MD-2972-2010 and  
CP-51-MD-13471-2010**

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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE <i>AMICUS CURIAE</i> .....	1
STATEMENT OF JURISDICTION.....	2
ORDER IN QUESTION.....	3
SCOPE AND STANDARD OF REVIEW .....	4
STATEMENT OF THE QUESTIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	6
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	8
I.    THE COMMONWEALTH COURT’S NEW EXCESSIVE FINES TEST IS NOT ONLY CONTRARY TO PRECEDENT BUT PROVIDES CLAIMANTS WHOSE INNOCENT OWNER DEFENSE WAS REJECTED WITH ANOTHER CHANCE TO DEFEAT FORFEITURE AND THIS WILL HAVE THE PREDICTABLE CONSEQUENCE OF INCREASING THE NUMBER OF STRAWMAN OR SHAM OWNERS .....	9
II.   THE COMMONWEALTH COURT’S DECISION RELIEVES A CLAIMANT FROM SATISFYING THE BURDEN OF PROOF WHEN PRESENTING AN INNOCENT OWNER DEFENSE AND NOW THE COMMONWEALTH MUST SATISFY TWO BURDENS IN ORDER TO PREVAIL IN FORFEITURE PROCEEDINGS .....	22
CONCLUSION.....	30
CERTIFICATE OF SERVICE .....	31

## TABLE OF AUTHORITIES

	Page(s)
<b><u>Cases</u></b>	
<i>Allright Auto Parks, Inc. v. Zoning Bd. of Adjustment of the City of Phila,</i> 529 A.2d 546 (Pa. Cmwlth. 1987).....	20
<i>Austin v. United States,</i> 509 U.S. 602 (1993) .....	11, 12, 14
<i>Beaston v. Ebersole,</i> 986 A.2d 876 (Pa. Super. 2009) .....	23
<i>Bennis v. Michigan,</i> 516 U.S. 442 (1996) .....	21
<i>Commonwealth v. \$11,600.00 Cash,</i> 858 A.2d 160 (Pa. Cmwlth. 2004).....	19
<i>Commonwealth v. \$2,523.48 U.S. Currency,</i> 649 A.2d 658 (Pa. 1994).....	19
<i>Commonwealth v. \$6,425.00 Seized From Esquilin,</i> 880 A.2d 523 (Pa. 2005).....	14, 18, 28
<i>Commonwealth v. \$73,671.30 Cash, Currency,</i> 654 A.2d 93 (Pa. Cmwlth. 1995), <i>appeal denied,</i> 664 A.2d 543 (Pa. 1995).....	19
<i>Commonwealth v. 1997 Chevrolet and Contents Seized from Young,</i> 106 A.3d 836 (Pa. Cmwlth. 2014), <i>appeal granted,</i> 120 A.3d 993 (Pa. 2015) .....	9, 10, 11, 17, 25, 26, 27
<i>Commonwealth v. 2314 Tasker Street,</i> 67 A.3d 202 (Pa. Cmwlth. 2013).....	12
<i>Commonwealth v. 2338 N. Beechwood Street,</i> 65 A.3d 1055, 1065 (Pa. Cmwlth. 2013).....	9

<i>Commonwealth v. 5444 Spruce Street,</i> 832 A.2d 396 (Pa. 2003).....	16
<i>Commonwealth v. 605 University Drive,</i> 104 A.3d 411 (Pa. 2014).....	9
<i>Commonwealth v. 605 University Drive,</i> 61 A.3d 1048 (Pa. Cmwlth. 2012).....	9
<i>Commonwealth v. 648 West Mayfield Street,</i> 819 A.2d 1226 (Pa. Cmwlth. 2003).....	26
<i>Commonwealth v. Assorted Consumer Fireworks,</i> 16 A.3d 554 (Pa. Cmwlth. 2011).....	18
<i>Commonwealth v. Central R. Co. of N.J.,</i> 58 A.2d 173 (Pa. 1948).....	19
<i>Commonwealth v. Coffey,</i> 247 S.W.3d 908 (Ky 2008).....	21
<i>Commonwealth v. Fidelity Bank Accounts,</i> 631 A.2d 710 (Pa. Cmwlth. 1993).....	25
<i>Commonwealth v. Giffin,</i> 595 A.2d 101 (Pa. Super. 1991) .....	18
<i>Commonwealth v. Heater,</i> 889 A.2d 1126 (Pa. Super. 2006) .....	21
<i>Commonwealth v. Heater,</i> 899 A.2d 1126 (Pa. Super. 2006) .....	24
<i>Commonwealth v. Marshall,</i> 698 A.2d 576 (Pa. 1997).....	24
<i>Commonwealth v. One 1988 Ford Coupe,</i> 574 A.2d 631 (Pa. Super. 1990) .....	19

<i>Commonwealth v. One Mack Dump Truck,</i> 743 A.2d 542 (Pa. Cmwlth. 1999).....	19
<i>Commonwealth v. Salamone,</i> 897 A.2d 1209 (Pa. Super. 2006) .....	23
<i>Commonwealth v. Smith,</i> 722 A.2d 167 (Pa. Super. 1998) .....	24
<i>Commonwealth v. Smith,</i> 757 A.2d 354 (Pa. 2000).....	23
<i>Commonwealth v. Thomas,</i> 814 A.2d 754 (Pa. Super. 2002) .....	23
<i>Commonwealth. v. Fontanez,</i> 739 A.2d 152 (Pa. 1999).....	24
<i>Estate of Peetros by Peetros v. County Detectives and Dist. Attorney's Office,</i> 492 A.2d 6 (Pa. Super. 1985) .....	13
<i>Ex rel. Perry v. Attorney General of Pennsylvania,</i> 2013 WL 3984620 (Pa. Cmwlth. 2013) .....	26
<i>In re Return of Prop. Confiscated October 30, 1999 from 411 East Mac Dade Boulevard,</i> 856 A.2d 238 (Pa. Cmwlth. 2004).....	25
<i>Jackson v. Hendrick,</i> 503 A.2d 400 (Pa. 1986).....	14
<i>Robinson v. California,</i> 370 U.S. 660 (1962) .....	14
<i>Shapley v. Commonwealth,</i> 615 A.2d 827 (Pa. Cmwlth. 1992).....	22
<i>Strand v. Chester Police Department,</i> 687 A.2d 872 (Pa. Cmwlth. 1997).....	22

<i>United States v. Ursery</i> , 518 U.S. 267 (1996) .....	21
---	----

<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998) .....	15, 16, 17, 18
---	----------------

**Statutes**

35 P.S. § 780-101 <i>et seq.</i> .....	12
--	----

42 Pa.C.S. § 6801(a)(6)(i)(C) .....	12
-------------------------------------	----

42 Pa.C.S. § 6801(a)(7).....	12
------------------------------	----

42 Pa.C.S. § 6802(j) .....	11, 12
----------------------------	--------

42 Pa.C.S. §§ 6801 <i>et seq.</i> .....	12
---	----

71 P.S. § 732-206(a) .....	1
----------------------------	---

**Other Authorities**

Pa. Const. Article IV, § 4.1 .....	1
------------------------------------	---

**Rules**

Pa.R.A.P. 531(a) .....	1
------------------------	---

Pa.R.A.P. 741(a) .....	23
------------------------	----

## **INTEREST OF THE *AMICUS CURIAE***

Under the Pennsylvania constitution, the Attorney General is the “chief law officer of the Commonwealth.” Pa. Const. Article IV, § 4.1. The Commonwealth Attorneys Act provides that the Attorney General is the “chief law enforcement officer of the Commonwealth.” 71 P.S. § 732-206(a). As both the “chief law officer” and “chief law enforcement officer” of the Commonwealth, the Attorney General is interested in the proper construction and application of the statutes of this Commonwealth and in the decisions of the courts of the Commonwealth interpreting its statutes, and otherwise establishing procedures for the fair and efficient administration of justice.

The Commonwealth Attorneys Act confers upon the Attorney General the authority to litigate Asset Forfeiture and Money Laundering matters that arise from law enforcement agencies with statewide jurisdiction. Those currently empowered are the agents of the Office of Attorney General and the Pennsylvania State Police. Consequently, *amicus curiae* has a substantial interest in the questions before this Court, as they involve critical issues pertaining to the litigation of petitions for condemnation and forfeiture.

*Amicus curiae* presents this brief in support of appellant, the Commonwealth of Pennsylvania, pursuant to Pa.R.A.P. 531(a).

## **STATEMENT OF JURISDICTION**

*Amicus curiae* hereby adopts the Statement of Jurisdiction as set forth by Appellant in its brief.



**ORDER IN QUESTION**

*Amicus curiae* hereby adopts the Order as set forth by Appellant in its brief.

## **SCOPE AND STANDARD OF REVIEW**

*Amicus curiae* hereby adopts the Statement of Scope and Standard of Review as set forth by Appellant in its brief.

## **STATEMENT OF THE QUESTIONS INVOLVED**

*Amicus curiae* write on the following questions:<sup>1</sup>

- I. Did the Commonwealth Court contravene this Court's and United States Supreme Court's precedent by adopting a subjective test, including culpability, for an excessive fine that is unworkable and illogical?

(Answered in the negative by the Commonwealth Court)

- II. Did the Commonwealth Court act beyond its authority and contravene this Court's precedent and the Forfeiture Act by holding that an innocent owner defense is proven even where the owner knew of drug sales from her property by her adult son and did nothing to stop them?

(Answered in the negative by the Commonwealth Court)

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<sup>1</sup> *Amicus curiae* observes that this Court has granted the Commonwealth of Pennsylvania's petition for allowance on appeal with respect to three issues. However, *amicus curiae* will only be addressing the second two issues as identified by this Court in its order dated July 30, 2015.

## **STATEMENT OF THE CASE**

*Amicus curiae* hereby adopts the Statement of the Case as set forth by Appellant in its brief.

## **SUMMARY OF ARGUMENT**

The decision in *Commonwealth v. 1997 Chevrolet and Contents Seized from Young*, 106 A.3d 836 (Pa. Cmwlth. 2014) (*en banc*), *appeal granted*, 120 A.3d 993 (Pa. 2015) must be reversed because the Commonwealth Court of Pennsylvania has ignored statutory authority and controlling precedent in order to purposefully impede the ability of the Commonwealth of Pennsylvania to prevail in any forfeiture matter wherein an innocent owner defense is presented, particularly where the property subject to forfeiture is real estate.

## ARGUMENT

The Commonwealth's Court's latest pronouncement in *Commonwealth v. 1997 Chevrolet and Contents Seized from Young*, 106 A.3d 836 (Pa. Cmwlt. 2014) (*en banc*), *appeal granted*, 120 A.3d 993 (Pa. 2015) wherein it re-writes the controlling test for excessive fines and impermissibly shifts the burden to the Commonwealth with respect to the innocent owner affirmative defense is the court's most recent attempt to redefine the rules, nature and scope of forfeiture proceedings.<sup>2</sup> The detrimental ramifications of the court's decision include a likely increase in the number of sham or strawman owners in forfeiture cases, a usurpation of the power of the lower courts to make credibility determinations with respect to the innocent owner defense, the impairment of the Commonwealth's

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<sup>2</sup> In *Commonwealth v. 605 University Drive*, 61 A.3d 1048 (Pa. Cmwlt. 2012) (*en banc*), a plurality of the Commonwealth Court held that to the extent that any previous cases had applied the Rules of Civil Procedure to forfeiture actions, those cases were overruled. *See id.* at 1053. The court reasoned that forfeiture proceedings, while nominally civil in nature, involved constitutional rights normally only involved in criminal proceedings. *See id.* A majority of the court agreed with the holding that there could be no summary judgment in a forfeiture case and that the civil rules on summary judgment did not apply to the forfeiture action in every case. *See id.* In another forfeiture case, the court held that Rule 1007.1 of the Pennsylvania Rules of Civil Procedure was inapplicable to forfeiture proceedings, stating that being a civil rule, "it does not address the due process concerns that are implicated in this quasi-criminal proceeding when one's personal residence could be forfeited and result in eviction and homelessness." *Commonwealth v. 2338 N. Beechwood Street*, 65 A.3d 1055, 1065 (Pa. Cmwlt. 2013) (*en banc*). "As a matter of due process, any waiver of the right to jury trial must be knowing, intelligent, and on the record." *Id.*

This Court reversed the Commonwealth Court in both cases. In *605 University Drive*, this Court expressly held that the rules of civil procedure did, in fact, apply to forfeiture proceedings and that summary judgment was appropriate. *See Commonwealth v. 605 University Drive*, 104 A.3d 411, 420 (Pa. 2014).

ability to prevail in any forfeiture matter where an innocent owner defense is pursued and inconsistent application of forfeiture law by the intermediary appellate courts. For the reasons set forth more fully below, the Commonwealth Court's decision must be reversed.

**I. THE COMMONWEALTH COURT'S NEW EXCESSIVE FINES TEST IS NOT ONLY CONTRARY TO PRECEDENT BUT PROVIDES CLAIMANTS WHOSE INNOCENT OWNER DEFENSE WAS REJECTED WITH ANOTHER CHANCE TO DEFEAT FORFEITURE AND THIS WILL HAVE THE PREDICTABLE CONSEQUENCE OF INCREASING THE NUMBER OF STRAWMAN OR SHAM OWNERS**

Where, as here, a trial court determined that the Commonwealth had established the necessary nexus between the unlawful activity and the property and the owner failed to prove her innocent owner defense, the court must conduct an analysis to determine whether the forfeiture would constitute an excessive fine. Although the test for an excessive fine is well-established, the majority of the Commonwealth Court has taken the liberty to re-write it so that a property owner's culpability is considered before it can be determined whether forfeiture punishes the owner within the confines of the Eighth Amendment. *See 1997 Chevrolet*, 106 A.3d at 882. The majority stated:

Where the perpetrator of the offense is not the property owner, the property owner's culpability must be evaluated by his own knowledge and actions, not the knowledge and actions of the wrongdoer. There must be some evidence that the owner participated in the offense to a

degree sufficient to justify the amount of the Commonwealth's proposed forfeiture.

*Id.* (footnote omitted). The motivation of the majority is clear. As observed by Judge Simpson in his dissenting opinion: “In reality, the Majority’s real agenda is to imperil civil forfeitures in the absence of a criminal conviction, contrary to settled law.” *1997 Chevrolet*, 106 A.3d at 882 (Simpson, J., dissenting). Not only does the majority ignore well-settled precedent, it has encouraged drug-peddlers to employ sham or strawman owners to effectively thwart attempts to forfeit property.

Forfeiture has traditionally been justified on two theories: 1) The property itself is “guilty” of the offense; and 2) The owner may be held accountable for the wrongs of others to whom he entrusts his property. *See Austin v. United States*, 509 U.S. 602, 615 (1993). Both of these theories rest upon the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for such negligence. *Id.* Indeed, as noted in a historical treatise on *in rem* proceedings:

It is a presumption of law that every owner knows his own property and also knows what use is made of it and what obligations rest upon it by his character or acts, or his expressed or implied contracts; and he, (if not an enemy,) is privileged to appear, claim his property and defend for it against the charges.

Rufus Waples, *A Treatise on Proceedings in Rem* 22 (1882). Historic precedent, however, did not allow for forfeiture whenever the owner had done all that



reasonably could be expected to prevent the unlawful use of his property. *See Austin*, 509 U.S. at 616.

Contrary to the position of the majority of the Commonwealth Court, sufficient protection already exists for the class of persons that are of concern to it. In a forfeiture proceeding, the Commonwealth bears the initial burden to establish, by a preponderance of the evidence, a nexus between the unlawful activity and the property in question. *See Commonwealth v. 2314 Tasker Street*, 67 A.3d 202 (Pa. Cmwlth. 2013). If the Commonwealth proves a nexus between the unlawful activity and the subject property, the burden shifts to the property owner to assert an innocent owner defense under Section 6802(j) of the Forfeiture Act. *Id.* In order to successfully assert an innocent owner defense, the property owner must establish:

- (1) That the claimant is the owner of the property or the holder of a chattel mortgage or contract of conditional sale thereon.
- (2) That the claimant lawfully acquired the property.
- (3) That it was not unlawfully used or possessed by him. In the event that it shall appear that the property was unlawfully used or possessed by a person other than the claimant, then the claimant shall show that the unlawful use or possession was without his knowledge or consent. Such absence of knowledge or consent must be reasonable under the circumstances presented.

42 Pa.C.S. § 6802(j). That the General Assembly intended to preserve the property of innocent owners from forfeiture was made clear through an amendment to the

Forfeiture Act in 1988.<sup>3</sup> 42 Pa.C.S. §§ 6801 *et seq.* Act of June 30, 1988, P.L. 464, No. 79, § 7. This statute clarified that “real property used or intended to be used to facilitate any violation of the [the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101 *et seq.*] [Controlled Substance Act],” 42 Pa.C.S. § 6801(a)(6)(i)(C), and any firearm “used or intended for use to facilitate a violation of the [Controlled Substance Act]” 42 Pa.C.S. § 6801(a)(7), were subject to forfeiture. In addition, the statute made clear that when an owner of property claimed that a third party used the property to violate the Controlled Substance Act without his knowledge or consent, the lack of knowledge or consent must be “reasonable.” 42 Pa.C.S. § 6802(j). Prior to the 1988 amendments, a person's property could be forfeited even if its owner had no knowledge of and did not consent to the prior unlawful use of the property by another person. *See, e.g., Estate of Peetros by Peetros v. County Detectives and Dist. Attorney's Office*, 492 A.2d 6 (Pa. Super. 1985). Accordingly, the 1988 amendment was a significant step toward balancing the Commonwealth's interest in forfeiture and the innocent owner's interest in preserving his or her property. As recognized by the

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<sup>3</sup> The original law codifying common law forfeiture was enacted in 1972. Act of April 14, 1972, P.L. 233, No. 64, § 28, 35 P.S. § 780-128, effective June 14, 1972. In 1984, the statute was amended by Act of December 14, 1984, P.L. 988, No. 200, § 2, effective in 60 days. The 1984 amendments expanded the scope of the forfeiture provisions, adding “money, negotiable instruments and securities used or intended to be used to facilitate any violation of [the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-101 *et seq.*] [Controlled Substance Act],” to the list of property subject to forfeiture. Act of December 14, 1984, P.L. 988, No. 200 § 2. Real property was also made subject to the forfeiture provisions. *Id.*

Pennsylvania Supreme Court in *Commonwealth v. \$6,425.00 Seized From Esquilin*, 880 A.2d 523 (Pa. 2005), the shifting burdens of proof under the Forfeiture Act represent a necessary balancing:

By burdening facilitation with the prospect of the loss of very real and substantial assets . . . the General Assembly increases the cost of engaging in the drug trade, which acts as an additional deterrent to the crime. In exchange for the fact that the Commonwealth is able to seize and retain a person's property under a civil standard, and subject to a lower civil standard of proof, the claimant is afforded the opportunity of rebuttal.

*See Esquilin, supra.* at 530. Accordingly, culpability of a property owner is, in fact, taken into consideration during forfeiture proceedings.

Should a court determine that the Commonwealth established the necessary nexus between the unlawful activity and the property but the owner failed to prove his/her affirmative defense, the court will thereafter conduct an analysis to determine whether the forfeiture would constitute an excessive fine. The United States Supreme Court determined that forfeiture that “constitutes payment to a sovereign as punishment for some offense” implicates limitations found in the Excessive Fines Clause of the Eighth Amendment.<sup>4</sup> *See Austin, supra.* at 622

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<sup>4</sup> The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. The Eighth Amendment is made applicable to the states through the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 664, (1962). The Pennsylvania Supreme Court has held that Article I, Section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment. *See Jackson v. Hendrick*, 503 A.2d 400, 404 (Pa. 1986).

(internal quotations omitted). Based on this determination, the Court later held that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.” *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). After finding no historical guidance as to “how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive,” the Supreme Court relied on two considerations to “deriv[e] a constitutional excessiveness standard” which it found to be “particularly relevant:”

The first . . . is that judgments about the appropriate punishment for an offense belong in the first instance to the legislature . . . The second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross proportionality articulated in our Cruel and Unusual Punishments Clause precedents.

*Id.* at 335-336. The Court went on to state that if the amount of the forfeiture is grossly disproportional to the gravity of the offense, it is unconstitutional. *See id.* at 337. The Court enumerated factors by which a court may measure the gravity of the offense, including the penalty imposed as compared to the maximum penalty available, whether the violation was isolated or part of a pattern of misbehavior, and, the harm resulting from the crime charged. *Id.* at 338–39.

This Court subsequently adopted the *Bajakajian* gross proportionality test to apply “to all punitive forfeitures regardless of the form of the underlying proceeding.” *Commonwealth v. 5444 Spruce Street*, 832 A.2d 396, 403 (Pa. 2003) (emphasis added). Thereafter, the Commonwealth Court decided *542 Ontario Street, supra*. wherein an owner lost his house through a forfeiture proceeding even though he was acquitted in connection of the underlying drug offenses. In applying *5444 Spruce Street*, the court conducted the following sound and proper analysis:

Our current challenge is to determine generally what offense and specifically what maximum penalty should be used in the analysis where, as here, ***an owner is acquitted and therefore not convicted of any offense and not subject to any criminal penalty.***

The approved test focuses on the conduct of the defendant. It does not explicitly require a conviction. Considering this, and mindful of our earlier discussion regarding the differences between criminal prosecutions and civil forfeiture proceedings, especially the different burdens of proof, we conclude that Blas' [the owner's] conduct as established by a preponderance of the evidence in the forfeiture proceedings may be evaluated. Further, the value of Blas' house may be compared against the maximum penalty for conduct which was established by a preponderance of the evidence in the forfeiture proceedings.

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***In this case, the civil jury found that Blas' house was used by or possessed by a person other than him for an unlawful purpose, and, significantly, Blas knew of or consented to the use of his house by another for an unlawful use. These findings, together with the circumstances set forth in the affidavits of probable cause and police reports setting forth the results of the 2005 search, are sufficient to support a preponderance-of-the-evidence determination Blas***

***conspired with the occupant of his property to possess with intent to deliver. As a result, it is appropriate to consider the gravity of that conduct and the maximum penalty available for the conspiracy.***

First, we compare the penalty imposed by the forfeiture against the maximum penalty available for conspiracy to possess cocaine with intent to deliver . . .

We next consider whether Blas' violation was isolated or part of a pattern of misbehavior. The trial court accepted as credible evidence adduced at the criminal trial indicating the Bethlehem Police employed multiple resources and various countermeasures to combat illegal activity at Blas' property. These included numerous controlled purchases at the property . . .

Finally, we evaluate the harm resulting from Blas' conduct. The trial court, quoting this Court, acknowledged that the harm caused to society by drug trafficking is self-evident. Also, the trial court found that Blas' property exacted a heavy toll from government resources, including the countermeasures employed by the Bethlehem Police over a one year period. Further, relying on the civil jury's findings, the trial court found the harm resulting from Blas' property was widespread.

*542 Ontario Street, supra.* at 419 (emphasis added).

According to the majority of the Commonwealth Court, *1997 Chevrolet* presented the court with an opportunity to, *inter alia*, determine how to apply *Bajakajian* where the owner of the forfeited property was not charged or convicted of any drug offenses. *See 1997 Chevrolet*, 106 A.3d at 854. In so doing, the majority adopted the approach of the Court of Appeals for the Second Circuit which included a subjective evaluation of the property owner's knowledge and actions. *See id.* at 862.

Including a claimant's culpability as a specific consideration in the *Bajakajian* balancing test is not only contrary to established precedent, it is illogical. As noted above, the General Assembly's innocent owner defense already focuses on the culpability of the owner. The only culpability required by the Excessive Fines Clause and applied through the Forfeiture Act is acting irresponsibly in the exercise of oversight and control over one's property. Now, the majority of the Commonwealth Court would have the Commonwealth prove that the owner participated in the offense itself in order to justify forfeiture of the property. Consideration of whether an owner was charged with, or convicted of a crime as a factor in the *Bajakajian* balancing analysis injects an improper subjective assessment into the equation that blurs the lines between the clearly demarcated, bifurcated system where criminal culpability and civil forfeiture are determined separately. *See Esquilin, supra.* at 699 (for property to be deemed forfeitable, neither a criminal prosecution nor a conviction is required); *Commonwealth v. Giffin*, 595 A.2d 101 (Pa. Super. 1991) (there need be no underlying conviction of a crime to support forfeiture of a person's property); *Commonwealth v. Assorted Consumer Fireworks*, 16 A.3d 554, 558 (Pa. Cmwlth. 2011) (forfeiture is a civil consequence of violating a criminal statute and consequently property is forfeited *not* as a result of a criminal conviction but in a separate civil proceeding); *One 1988 Toyota Corolla, supra.* (the burden of proof

in criminal proceedings is the “beyond a reasonable doubt” standard, while proceedings under the Forfeiture Act are civil in nature and are governed by the “preponderance of the evidence” standard); *see also Commonwealth v. \$11,600.00 Cash*, 858 A.2d 160 (Pa. Cmwlth. 2004); *Commonwealth v. One 1988 Ford Coupe*, 574 A.2d 631, 633 n. 2 (Pa. Super. 1990); *Commonwealth v. \$73,671.30 Cash, Currency*, 654 A.2d 93, 94 (Pa. Cmwlth. 1995), *appeal denied*, 664 A.2d 543 (Pa. 1995); *Commonwealth v. One Mack Dump Truck*, 743 A.2d 542 (Pa. Cmwlth. 1999).

If the legislature had intended for forfeiture to apply only to cases where a person had been convicted of a crime, it certainly would have incorporated such language into the statute. However, by removing the forfeiture provisions from the Controlled Substances Act and inserting them into the Code of Judicial Procedure, the legislature made it clear that conviction and forfeiture were not dependent upon one another. Statutes authorizing forfeiture are to be strictly construed. *See Commonwealth v. \$2,523.48 U.S. Currency*, 649 A.2d 658, 660–61 (Pa. 1994). An appellate court cannot by judicial fiat effectively nullify clearly expressed legislative intention; to do so would constitute judicial legislation and an unconstitutional encroachment upon the legislative branch of our system of government. *See Commonwealth v. Central R. Co. of N.J.*, 58 A.2d 173 (Pa. 1948); *see also Allright Auto Parks, Inc. v. Zoning Bd. of Adjustment of the City of*



*Phila*, 529 A.2d 546, 549 (Pa. Cmwlth. 1987) (there is no judicial authority to rewrite laws for the purpose of improving them or to restructure them in accordance with what might have been the hopes of nonlegislative advocates).

Obviously, there are reasons other than actual innocence for acquittals. The Commonwealth may have failed to satisfy its high burden of proof beyond a reasonable doubt, or the verdict reflected the unreviewable exercise of “mercy” or “jury nullification” powers. There are also classes of individuals who are charged with a criminal offense whose cases are dismissed, not due to actual innocence, but because the Commonwealth is precluded from proceeding to trial due to missing or non-cooperative witnesses, suppression of critical evidence or a violation of Rule 600 of the Rules of Criminal Procedure. Similarly, there are reasons, other than actual innocence, as to why an individual is not charged with a crime. The prosecutor may have exercised discretion not to charge and/or granted the individual immunity in exchange for his/her cooperation. Therefore, simply considering the status of someone as uncharged or acquitted for purposes of mitigation against forfeiture is not necessarily an accurate reflection of what the majority of the Commonwealth Court would like it to stand for, *i.e.*, a lack of culpability.

The laudable goal of the Forfeiture Act is to eliminate economic incentives of drug-related activity and thereby deter such activity. *See Commonwealth v.*

*Heater*, 889 A.2d 1126, 1132 (Pa. Super. 2006). In discussing the Comprehensive Drug Abuse Prevention and Control Act of 1970, the United States Supreme Court observed that:

Requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes.

*United States v. Ursery*. 518 U.S. 267 (1996); *see also Bennis v. Michigan*, 516 U.S. 442, 452, (1996) (“Forfeiture of property prevents illegal uses . . . by imposing an economic penalty, thereby rendering illegal behavior unprofitable”). Furthermore, as recognized by the Pennsylvania Supreme Court in *\$9,847.00 U.S.*

*Currency, supra*:

Furthermore, the government has an additional interest in deterring illegal drug transactions by depriving those who illegally deal in controlled substances of the ill-gotten profits of those endeavors and of the instrumentalities used in aiding violations of controlled substance laws. The government has determined that this interest is advanced through forfeiture of all proceeds arising from violations of the Controlled Substance, Drug, Device and Cosmetic Act and of all property used in the facilitation of those violations. We find that the government interest in this case is entitled to significant weight, and we further find that the method chosen by the government to effectuate this interest is reasonably related to furthering its interest.

704 A.2d at 616 (footnotes omitted); *see also Commonwealth v. Coffey*, 247 S.W.3d 908 (Ky. 2008) (“When it comes to drug trafficking, the preventive aspect is clear. If one stands to lose valuable property, then one should think twice about

using it in the commission of a drug crime. If that property has been obtained as the fruits of criminal drug related activities, then those ill-gotten gains should not be left to the benefit of the criminal.”)

An unfortunate reality is that people engaged in illegal drug activities attempt to disguise their interests in property by placing title in someone else’s name. By setting up a sham or strawman owner, drug peddlers try to thwart the forfeiture of property that is used in connection with their unlawful activities. Accordingly, courts must be careful to look behind the formal title to determine whether someone has been set up to conceal the illegal dealings of someone else. There are multiple cases where an innocent owner defense was rejected as being a sham. *See Strand v. Chester Police Department*, 687 A.2d 872, 874–77 & n. 9, 13 (Pa. Cmwlth. 1997) (title holder had no connection with the vehicle other than his name on bill of sale and title documents, and appeared to have multiple vehicles that he did not use and as to which he had little knowledge listed in his name); *One 1988 Toyota Corolla, supra* (evidence of title holder’s purchase of the vehicle was incomplete, and user had total control over vehicle, described it as his and installed his own accessories in it); *Shapley v. Commonwealth*, 615 A.2d 827, 829 (Pa. Cmwlth. 1992) (vehicle was purchased and paid for by user, not title holder, user stated at purchase that title was being placed in title holder’s name for “technical reasons,” and title holder was incapable of driving the vehicle).

Should the fact that someone has not been charged criminally factor into the analysis of an excessive fines determination, most certainly the number of sham ownership cases will increase. Knowing that an uncharged person has another chance to argue against forfeiture even if his/her innocent ownership defense is rejected will encourage drug dealers to recruit and ensnare more individuals as pawns in their criminal operations, either knowingly or perhaps unwittingly, thereby increasing third party exposure to danger, violence and perpetration of fraud upon the courts.

**II. THE COMMONWEALTH COURT’S DECISION RELIEVES A CLAIMANT FROM SATSIFYING THE BURDEN OF PROOF WHEN PRESENTING AN INNOCENT OWNER DEFENSE AND NOW THE COMMONWEALTH MUST SATISFY TWO BURDENS IN ORDER TO PREVAIL IN FORFEITURE PROCEEDINGS**

Prior to its decision in *1997 Chevrolet*, the Commonwealth Court had adhered to the well-settled principle that credibility determinations are within the sole province of a lower court. *See, e.g., Commonwealth v. Fidelity Bank Accounts*, 631 A.2d 710 (Pa. Cmwlth. 1993) (“It is axiomatic that as factfinder the trial court is empowered to decide what evidence is credible and to draw any reasonable inferences from all of the evidence”); *McJett*, 811 A.2d at 111 (“the trial court found McJett to be ‘unworthy of belief’ and, as finder of fact, the judge was solely responsible for evaluating the credibility of the witnesses and weighing

their testimony”); *In re Return of Prop. Confiscated October 30, 1999 from 411 East Mac Dade Boulevard*, 856 A.2d 238, 249 (Pa. Cmwlth. 2004) “[t]he credibility of witnesses and the weight to be accorded to the evidence produced are matters within the province of the fact finder” in forfeiture cases). Accordingly, the Commonwealth Court’s review is limited to examining whether the findings of fact made by the trial court are supported by substantial evidence, and whether the trial court abused its discretion or committed an error of law. *See Commonwealth v. 648 West Mayfield Street*, 819 A.2d 1226 (Pa. Cmwlth. 2003).

With its pronouncement in *1997 Chevrolet*, however, the majority of the Commonwealth Court has developed a method to effectively strip the lower courts of their right to rely upon credibility determinations when evaluating whether or not a claimant satisfied his/her burden of establishing the innocent owner defense. Now, it is not enough for a trial court to find that the claimant has not carried the statutory burden because his/her testimony was not credible ; instead, there must be additional facts presented from which a trial court can draw its conclusions:

[A] negative credibility finding did not constitute positive evidence that supported a finding of fact . . . Stated another way, this [c]ourt determined that the factfinder's disbelief of Young's statement that she had no knowledge of her son's activity did not allow the factfinder to draw the contrary conclusion, *i.e.*, that she did have knowledge.<sup>5</sup>

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<sup>5</sup> Curiously, just one year earlier, the Commonwealth Court applied the opposite - - and proper - - analysis in the case of *Com. ex rel. Perry v. Attorney General of Pennsylvania*, 2013 WL 3984620, at \*4-\*5 (Pa. Cmwlth. 2013) (cited pursuant to Commonwealth Court Internal Operating Procedures § 414) wherein the court stated:

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. . .[A] party required to prove a negative is saddled with a virtually impossible burden. Accordingly, courts generally do not require litigants to prove a negative because it cannot be done. It is problematic that a person can be deprived of her home because she is unable to prove a negative. This is why the Forfeiture Act requires the owner's lack of knowledge to be reasonable under the circumstances presented.

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The Forfeiture Act places the burden on the property owner to prove a negative, *i.e.*, lack of knowledge or lack of consent. The legislature eases this impossible burden somewhat by adding that a lack of knowledge or consent must be reasonable under the circumstances. It is not enough simply to disbelieve the property owner; the trial court must identify the circumstances that make it reasonable to infer that the property owner had actual knowledge and did consent to the violation of the Drug Act.

*1997 Chevrolet*, 106 A.3d at 869-70 (internal citations and quotations omitted)

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Finally, Perry argues that the Commonwealth “failed to overcome the presumption that the [Currency] was Davida Perry’s.” Once the Commonwealth establishes a nexus between property and violations of the Drug Act, the burden shifts to the person opposing the forfeiture to prove he owns the money, acquired it lawfully, and did not use or possess the money for an illegal purpose. In a forfeiture proceeding, “[t]he trial court is the fact finder and, as such, is empowered to make credibility determinations and to draw any reasonable inferences from all of the evidence.” While Davida Perry’s testimony estimating that she contributed approximately 75% of the Currency from her legitimate sources of income would, if credited, help her sustain her burden as an innocent owner of part of the Currency, the trial court was not required to accept her estimate as credible and there is no indication that it did so. *Davida Perry’s uncredited assertion of ownership and estimate of her contribution created no presumption for the Commonwealth to rebut and the trial court did not err or abuse its discretion by not crediting this testimony.*

*Id.* at \*5 (internal quotations and citations omitted) (emphasis added)

By removing credibility determinations from the equation and impermissibly shifting the burden back to the Commonwealth to prove that the owner *did* have knowledge of the drug-dealing activities, the Commonwealth Court majority's revision of the law has two alarming consequences: 1) Essentially, a claimant no longer bears any real burden of proof in terms of the presentation of an innocent owner defense; and, 2) the Commonwealth must now bear two burdens in order to prevail in a forfeiture proceeding whenever an innocent owner defense is introduced.

As this Court has acknowledged, albeit in a footnote, when evaluating the innocent owner defense, demeanor-based credibility determinations may often be dispositive of the issue:

Of course, in many instances, the trial judge in a forfeiture proceeding hears live witnesses and is in a position to render demeanor-based credibility determinations. In such instances, the usual deference applicable to credibility determinations may be dispositive.

*Esquilin*, 880 A.2d at 536, n. 7. If the Commonwealth Court majority's decision is left to stand, however, all that a claimant needs to do is deny knowledge of drug-dealing activities and a lower court's assessment that the claimant lacks any credibility is essentially meaningless. According to the majority, unless there is other evidence to demonstrate that the owner did in fact have knowledge of the drug-dealing activities, or consented thereto, forfeiture can never be granted.

Although the legislature made it abundantly clear in the statute that it is the purported owner who bears the burden of proof, the Commonwealth Court has now shifted that burden back to the Commonwealth. Thus, not only must the Commonwealth establish a nexus between the unlawful activity and the subject property, it must now disprove any innocent owner defense under Section 6802(j) of the Forfeiture Act. Exactly how the Commonwealth can disprove an innocent owner defense has also been impermissibly restricted by the Commonwealth Court. Indeed, the majority in *1997 Chevrolet* chipped away at the Commonwealth's proof by finding that the owner was not required to believe a police officer's word (or as the majority referred to it - "allegation") that her son was selling drugs. *See 1997 Chevrolet*, 106 A.3d at 868. Therefore, not only are a lower court's credibility findings rendered moot when it comes to evaluating a claimant's assertion of ownership, its credibility findings are further impaired because it is not supposed to give any weight to a police officer's testimony (standing alone) that the owner was informed that the property was being used to facilitate violations of the Drug Act.

Another result of the Commonwealth Court's election to ignore the statutory language and controlling precedent is the confusion that it is creating at the lower court level. Although a narrow reading of *1997 Chevrolet* suggests that an evaluation of a claimant's knowledge or consent is only triggered once the first two



prongs of the innocent owner defense at 42 Pa.C.S. § 6802(j) have been satisfied, at least one lower court has interpreted *1997 Chevrolet* as requiring the Commonwealth to prove knowledge or consent even if a court does not believe that the claimant is the owner of the property and a proper party to the action. In *Commonwealth v. \$51,402.66, et al.*, a case currently pending before the Commonwealth Court at docket number 1465 CD 2015,<sup>6</sup> a lower did not believe the claimant-father's testimony that the large sum of currency found in his son's vehicle upon his son's arrest for narcotics belonged to him [father]. Despite this finding, however, the lower court felt constrained to deny the petition for forfeiture because the Commonwealth did not prove that the father had knowledge of, or consented to, violations of the Drug Act. The Commonwealth Court's pronouncement that "[i]t is not enough simply to disbelieve the property owner" is obviously problematic in this regard.<sup>7</sup>

Finally, it is axiomatic that decisions rendered by the Commonwealth Court are not binding on the Pennsylvania Superior Court. *See Beaston v. Ebersole*, 986 A.2d 876, 881 (Pa. Super. 2009) (citing *Commonwealth v. Thomas*, 814 A.2d 754, 759 n. 2 (Pa.Super.2002)). And, although normally forfeiture appeals are taken

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<sup>6</sup> Appellant, the Commonwealth of Pennsylvania, filed its brief in this matter on December 28, 2015. The brief for the Appellee is presently due on February 1, 2016.

<sup>7</sup> It is easy to imagine a similar scenario in a proceeding where a claimant asserts ownership of a handgun that was seized from someone else's vehicle.

directly to the Commonwealth Court, the Superior Court still addresses forfeiture matters on occasion. *See Commonwealth v. Smith*, 757 A.2d 354, 357 n.1 (Pa. 2000) (“Although ordinarily forfeiture actions proceed to the Commonwealth Court, the Superior Court determined that the matter fell within its appellate jurisdiction because the Commonwealth was appealing the judgment of sentence in addition to the denial of the forfeiture order . . . This determination is not challenged in the instant action.”); *Commonwealth v. Salamone*, 897 A.2d 1209, 1212 n.5 (Pa. Super. 2006) (“The Commonwealth filed an application to transfer the appeal from the forfeiture order from this Court to the Commonwealth Court. On March 17, 2005, the application was denied *per curiam* because of Appellant’s related and pending appeal from the judgment of sentence.”); *Commonwealth v. Smith*, 722 A.2d 167, 169–70 (Pa. Super. 1998) (Commonwealth appealed not only the denial of the application for forfeiture, but also the judgment of sentence, claiming that the condition of the sentence that directed the application of the seized currency to the mandatory fine and court costs was illegal; Superior Court found it had jurisdiction, but also noted that there had been no objection to its jurisdiction and therefore, pursuant to Pa.R.A.P. 741(a) any challenge to jurisdiction was waived); *Commonwealth v. Heater*, 899 A.2d 1126 (Pa. Super. 2006)(wherein defendant challenged his convictions for drug violations as well as

a court order directing him to forfeit \$42,085 in cash related to drug sales).<sup>8</sup> As a result of the Commonwealth's Court resolution that it will no longer adhere to the statute and caselaw, its subsequent decisions will be at odds with Superior Court decisions where that court properly applies the binding precedent. The result would be inconsistent and chaotic results between the intermediary appellate courts of this Commonwealth and it would also encourage forfeiture claimants on appeal in Superior Court to move to transfer their cases to the Commonwealth Court in order to obtain a remand and a more favorable outcome.

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<sup>8</sup> This Court has never addressed this issue as to whether venue lies properly with the Commonwealth Court although its tacit approval may be inferred from review of the merits of forfeiture decisions without comment on the jurisdiction of the Commonwealth Court to render the decision appealed. *See, e.g., Commonwealth v. Smith, supra* at 357 n.1 ) (“Although ordinarily forfeiture actions proceed to the Commonwealth Court, the Superior Court determined that the matter fell within its appellate jurisdiction because the Commonwealth was appealing the judgment of sentence in addition to the denial of the forfeiture order. . . . This determination is not challenged in the instant action.”); *Commonwealth v. Fontanez*, 739 A.2d 152 (Pa. 1999) (Supreme Court considered merits of appeal from Commonwealth Court without reference to the jurisdiction of the Commonwealth Court to hear the appeal from the court of common pleas); *Commonwealth v. Marshall*, 698 A.2d 576 (Pa. 1997) (Commonwealth Court affirmed trial court order denying petition for return of property; this Court reversed but without comment on jurisdiction).

**CONCLUSION**

*Amicus curiae* respectfully requests this Court to reverse the decision of the Commonwealth Court.

**Respectfully submitted,**

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**Date: January 8, 2016**

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, : Nos. 29 EAP 2015  
Appellant : 30 EAP 2015  
v. :  
:   
:   
REAL PROPERTY AND IMPROVEMENTS :  
KNOWN AS 416 S. 62<sup>nd</sup> STREET, :  
PHILADELPHIA, PA 19143 and :  
1997 CHEVROLET AND CONTENTS :  
SEIZED FROM JAMES YOUNG, :  
:   
:   
APPEALS OF: ELIZABETH YOUNG, :  
Appellee :

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a copy of the foregoing document upon the person(s) below via the electronic filing system and by first class mail:

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