IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Crim. No. 17-238
	:	
PEDRO RAMON PAYANO	:	
a/k/a "Joemanuel Nunez-Suarez"	:	

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION

Introduction

Pennsylvania State Trooper Thomas Fleisher testified at a suppression hearing that Pedro Payano drew his suspicion for drug trafficking because Mr. Payano and his companion were not wearing "suits or any kind of business attire" when driving an older, two-door, car on the highway at 9:30 a.m. on a weekday. Memorandum Opinion of Sept. 26, 2017 ("Memorandum"), at 3. The Court concluded that "the ethnicity of Payano and Acosta very likely figured into Trooper Fleisher's motivation for the traffic stop" (*id.* at 11); and that Trooper Fleisher's rationale for extending the stop was "simply not credible" (*id.* at 1), both because he invoked innocent conduct (like not wearing business attire), and because he "embellish[ed] and mischaracterize[ed] the traffic stop" in his testimony (*id.* at 15). While upholding the initial stop as *Whren v. United States*, 517 U.S. 806 (1996) required, the Court suppressed the evidence that Trooper Fleisher's continued investigation yielded.

After resisting suppression forcefully, the government now concedes that Trooper Fleisher lacked reasonable suspicion to continue his investigation. But it asks that this Court withdraw its Memorandum Opinion and "issue a new Memorandum without []

statements" about racial motivation or credibility. Government's Motion for Reconsideration ("Motion") at 2. The government candidly explains that its goal is to protect Trooper Fleisher from credibility attacks in future criminal and civil rights cases, by eliminating a record of this Court's findings. Motion at 9. That explanation is premised on the assumption that the government will never disclose the Court's conclusions if the Court grants its Motion.

The government's request should be denied.

Argument

1. The Government Ignores The Public Interest In Transparency About Police Misconduct.

The government makes no attempt to meet the stringent standard for hiding from the public information illuminating one of the most fraught issues of our day: the role of racial prejudice and false testimony[1] in the criminal justice system. As the Court of Appeals for the Third Circuit recently explained in affirming a First Amendment right to record police at work, the public's interest in information about police practices is substantial:

> The First Amendment protects the public's right of access to information about their officials' public activities. It "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 783, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). Access to information regarding public police activity is particularly

[1] *E.g., Taking on Testilying: The Prosecutor's Response to In-Court Police Deception*, in *Crime & Justice in America: Present Realities and Future Prospects*, 223-43 (2d ed. 2002) (Wilson R. Palacios, Paul F. Cromwell, and Roger G. Dunham, eds.); Christopher Slobogin, Testilying: Police Perjury and What To Do About It, 67 U. Colo. L. Rev. 1037 (Fall 1996) (citing, *e.g.,* Report of Comm'n to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep't, City of New York, at 36 (1994) ("Several officers also told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: 'testilying.'"), at 1040 n.11).

> important because it leads to citizen discourse on public issues, "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)); *Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964) (recognizing the "paramount public interest in a free flow of information to the people concerning public officials, their servants"). That information is the wellspring of our debates; if the latter are to be "'uninhibited, robust, and wide-open,'" *Snyder*, 562 U.S. at 452 (quoting *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)), the more credible the information the more credible are the debates.

Fields v. City of Philadelphia, 862 F.3d 353, 359 (3d Cir. 2017).

In addition, of course, the public has a well-established right of access to records of court proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 10 (1986); *United States v. Criden*, 675 F.2d 550, 554 (3d Cir. 1982) (applying public right of access to pretrial suppression hearings). That right is relevant here because the government's Motion is functionally a motion to seal portions of the Court's opinion. It does not ask the Court to make different findings – that the officer was not motivated by race, or that he testified credibly – on the challenged topics, but simply to excise from its opinion "statements about the Trooper's state of mind and … findings regarding his credibility."[2] Motion at 2 ("issue a new Memorandum without those statements").

[2] The government reviews the record to "allay the Court's credibility concerns" in support of its request to excise them (Government's Motion for Reconsideration, at 2 (heading "A")), without arguing that the Court's findings were clearly erroneous. The government has since withdrawn the appeal in which it may have challenged the Court's findings as clearly erroneous (*see* Doc. 55, return of mandate after voluntary dismissal); and moved to dismiss the count that was based on the suppressed evidence (Docs. 54, 56). Only this request to sanitize the Court's opinion is still pending.

The public interest in acquiring accurate information about police misconduct cannot be overstated. And that interest is actually synergistic, not antagonistic, to law enforcement's interests. Only transparency about the problem and law enforcement's efforts to address it can restore public trust in the criminal justice system, against accusations of systemic racism and a suspicion that law enforcement will protect its own at the people's expense. *See generally, e.g.*, *Fields*, 862 F.3d at 360 (noting importance of transparency to efforts to combat police misconduct); *United States v. Mosley*, 454 F.3d 249, 268 n.24 (3d Cir. 2006) (citing Robin Shepard Engel, *et al.*, *Project on Police–Citizen Contacts* (2004) (report and recommendations prepared for Pennsylvania State Police); New Jersey Senate Judiciary Committee, *The New Jersey Senate Judiciary Committee's Investigation of Racial Profiling and the New Jersey State Police: Overview and Recommendations* (2001)); *see generally* Jeffrey Benzing, State Police Vague on Internal Misconduct Despite Reforms (Sept. 19, 2015), available at http://publicsource.org/state-police-vague-on-internal-misconduct-despite-reforms/. When the public lacks confidence in law enforcement fewer crimes get reported, fewer civilians cooperate with investigations, and disrespect for the law flourishes. That cycle leads to an increase in crime, an inability to charge the guilty, and a decrease in the just resolution of charges that are brought.

The government's perfunctory acknowledgment that "[r]acial profiling is a very serious issue for prosecutors, and everyone else concerned about the even-handed application of the law" (Motion at 8) does not begin to grapple with this weighty public interest in transparency. To the contrary, the government asks only that the Court protect the individual officer – a purportedly "dedicated," "trustworthy," officer – against an

"indelible, and unfair, impression" that he testified falsely and was motivated by racial bias. Motion at 2, 9.

But the "impression" left by the Court's opinion is not at all "unfair." A simple Google search for the officer's name and "Pennsylvania State Police" yields, for example, a troubling Court of Common Pleas decision denying a Commonwealth forfeiture petition because Trooper Fleisher lacked reasonable suspicion for the car stop and frisk of the suspect, from which the seizure of currency flowed. *Commonwealth v. $40,297.00 U.S. Currency*, No. CI-14-09349 (Lanc. Ct. Common Pleas, Oct. 5, 2015), attached as Exhibit "A."[3] That opinion is revealing. First, although not making an express credibility finding, it states that Trooper Fleisher's proffered rationale for stopping the car – a windshield obstruction – and his proffered rationale for the frisk – officer "safety" – were both unsupported by the evidence. *Id.* at 14-15. Of equal or greater concern is this:

> There was also no testimony to establish reasonable suspicion that [the suspect and eventual forfeiture] Claimant may have been armed and dangerous as to justify a pat down. Trooper Fleisher admitted that Claimant did not do anything aggressive, although he described Claimant as "aggressive, you know, in nature."

Id. at 14 (internal citations omitted).

The opinion does not specify what Trooper Fleisher thinks a person who is "aggressive … in nature" (albeit not aggressive in action) looks like, but counsel has learned that the person in question is African-American.[4] The canard that African Americans (and

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[3] The opinion is also available at http://lancasterbar.org/wp-content/uploads/2016/05/2015_CI_CI-14-09349_Commonwealth-v-40297-00-U-S-Currency_20151005_OP_Cullen.pdf.

[4] Counsel obtained this information from Attorney William Braught, who represented the suspect/forfeiture Claimant in the matter.

black men, in particular) are aggressive by "nature" has been a mainstay of America's long and painful history of institutional racism in law enforcement. *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 105-09 (rev. ed. 2012) (discussing, *inter alia*, impact of *Whren, supra*); Ferris State Univ. (Michigan), Jim Crow Museum of Racist Memorabilia, "The Brute Caricature," *available at* https://ferris.edu/jimcrow/brute/.

And a simple PACER search reveals a civil rights Complaint against Trooper Fleisher under 42 U.S.C. § 1983 with allegations that parallel this case in a striking way: he stops people when he feels that their race does not match their environs. Two Caucasian plaintiffs alleged that Trooper Fleisher stopped their car, ransacked it, and strip-searched them because "it was abnormal for two Caucasian males to be driving through a black neighborhood."[5] Amended Complaint in *Purcell v. Fleisher*, 11-cv-07803 (E.D. Pa.), attached hereto as Exhibit "B," at 3 ¶17. This is a telling parallel to his having stopped two people of color entering the Pennsylvania Turnpike on a weekday morning because they were not wearing "suits or any kind of business attire" and were driving an old car. *See* Memorandum at 3.

At least two legal doctrines required the government to identify and disclose this information before telling this Court that its findings unfairly malign Trooper Fleisher.

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[5] The government asserts, in its Motion, that there is no "evidence that the Trooper has a practice of disproportionately stopping motorists of *any particular* race or ethnicity." Motion at 8 (emphasis added). But an officer who stops motorists of various races when their race makes him suspicious is still profiling them on the basis of race.

Purcell v. Fleisher was settled with no judicial fact-finding. *See* Docket in 11-cv-07803 (E.D. Pa.), Doc. 13 (Order dismissing Complaint with prejudice upon settlement, pursuant to Local Rule 41.1(b)).

First, officers of the court must reasonably investigate the assertions of fact that they make to a court. Second, the findings of fact in the *Commonwealth v. $40,297.00 U.S. Currency* case, at least, were *Giglio*[6] material that should have been disclosed to the defense before Trooper Fleisher testified at the suppression hearing.[7] And now that this Court has made findings very similar to those made in *Commonwealth v. $40,297.00 U.S. Currency*, the government asks the Court to spare it the obligation to disclose them to future defendants.

Of course, suppressing this Court's conclusions would be improper even if Trooper Fleisher's record were otherwise beyond reproach. The government argues that Trooper Fleisher's stated rationale is "not at all consistent with the Trooper using that information as a pretext for a race-based motivation" (Motion at 9),[8] but no court makes lightly the

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[6] *Giglio v. United States*, 405 U.S. 150 (1972) (applying *Brady v. Maryland*, 373 U.S. 83 (1963)). The en banc Third Circuit has confirmed that the *Brady/Giglio* obligation applies even to public documents that the defense could obtain as easily as the prosecutors. *Dennis v. Sec'y, Penna. Dept. of Corrections*, 834 F.3d 263, 292 (3d Cir. 2016) (en banc).

[7] *See, e.g., United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (knowledge of information in files of local law enforcement imputed to federal prosecutors).

A Panel of the Third Circuit has accepted, without the Court's having expressly decided, that *Brady* applies at suppression hearings. *See, e.g., United States v. Coleman*, 545 Fed. Appx. 156, 159 (3d Cir. 2013) (evaluating *Brady* claim in suppression context but finding no violation on facts). In addition, DOJ instructs prosecutors to disclose impeachment material that "might have a significant bearing on the admissibility of prosecution evidence," even if not legally required. U.S. Attorney's Manual § 9-5.001(b)(1).

DOJ also instructs prosecutors to follow a detailed procedure for discovering *Giglio* information "before calling [a] law enforcement employee as a witness." *Id.* § 9-5.002(B)(6). And DOJ acknowledges, as it must, that *Giglio* material may include, for example, "any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding"; and "prior findings by a judge that an agency employee has testified untruthfully … [**or**] engaged in an unlawful search or seizure …." *Id.* § 9-5.100(5)((c)(i), (c)(iv) (emphasis added).

[8] The government's suggestion that Trooper Fleisher could not have engaged in racial profiling because he did not expressly invoke race during the stop or on the stand (*see* Motion at 8) would create a dangerous safe harbor for racialized law enforcement. And the government's suggestion that Trooper Fleisher was somehow deprived of an opportunity

findings that the Court made here. As the government notes, "it is infrequent that law enforcement witnesses are explicitly deemed not credible in published opinions" (Motion at 10 n.1), but that only underscores the significance of this Court's analysis. When a court with a firm appreciation for the law enforcement function receives prehearing briefing, and testimonial and video evidence; takes several weeks to consider it; writes a careful opinion spanning eighteen pages; and concludes, in that opinion, that a law enforcement officer was very likely motivated by race when he stopped a motorist and then "embellish[ed] and mischaracterize[ed]" facts about the stop – the public interest demands transparency about those findings.[9]

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to refute an inference of racial bias (Motion at 8) is simply specious. As the government admits, the defense noted the issue in its prehearing brief. *Id.* At the hearing, Trooper Fleisher listed the factors that led him to make the stop. By omitting race from that list, he implicitly asserted that race was not a factor. Had he wished to make that assertion expressly – "race was not among the factors I considered" – he was free to do so. Nor did anything prevent the prosecutor from asking this question at the hearing, knowing that the defense had raised it, if the prosecutor thought that fairness required addressing race expressly.

In any event, it was fair for the Court to infer that an experienced officer who testified that he stopped two people of color because *they were not wearing business suits* was twisting himself into knots to avoid saying "race." The explicit denial "I did not consider race" would have been no more credible than the implicit denial that Trooper Fleisher made.

[9] The government also wants to hide the Court's conclusions from future Section 1983 civil rights plaintiffs (Motion at 10), but the Supreme Court recognizes that Section 1983 plaintiffs are "private attorneys general" vindicating the public interest. *E.g., Fox v. Vice*, 563 U.S. 826, 833 (2011); *see also* n.5, *supra*, and accompanying text.

2. Hiding This Court's Conclusions About Trooper Fleisher Would Not Change The Government's *Giglio* Obligations, But It Would Make Enforcement Of Those Obligations More Difficult For Defendants.

The government wants this Court to whitewash its conclusions about racial motivation and false testimony in order to shield Trooper Fleisher from future cross-examination about them.[10] Motion at 9-10. As things stand now, the government admits, the findings are *Giglio* material (Motion at 9) – and the government does not want them to be.

But even if the Court were to issue a sanitized superseding opinion omitting reference to its conclusions about racial bias and false testimony, *they would still exist*, and the government would still be required to disclose them. Just as *Brady* requires disclosing a witness statement favorable to the defense even if the witness later recants it,[11] even a new set of factual findings would not alter the government's obligation to disclose the earlier ones. And again, the government does not ask the Court to issue new findings; it merely asks the Court to hide the findings it made – on the assumption that the government will not disclose them, and future defendants will be unable to find them. *See* Motion at 2,

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[10] The government's assertion that this Court's findings may negatively impact Trooper Fleisher's employment is belied by the fact that the findings in *Commonwealth v. $40,297.00 U.S. Currency* – that Trooper Fleisher's stated rationales for a stop and frisk were unsupported by the evidence, and that he had conducted an unreasonable search and seizure – apparently had no impact on him. *See generally* Benzing, State Police Vague On Internal Misconduct Despite Reforms, *supra*.

[11] *E.g., Dennis*, 834 F.3d at 298-300 (favorable witness statement was *Brady/Giglio* material despite witness's later denial that she made statement, and denial of facts asserted in it); *United States v. Trie*, 21 F. Supp.2d 7, 26 (D.D.C. 1998) ("[I]f a witness initially indicates that the defendant did not engage in criminal activity but then changes her position to state that he did … the report of the first interview would be quintessential *Brady* material").

9-10. In other words, the government asks this Court to facilitate future *Giglio* violations by hiding its analysis from the public and future defendants.[12] The Court should not do so.

Brady and *Giglio* are due process cases, grounded in the Fourteenth and Fifth Amendments, respectively. A future defendant's ability to cross-examine Trooper Fleisher with the Court's unsanitized opinion is not an "unfair" consequence of his misconduct (*see* Motion at 2); it is a consequence that the Constitution demands. Without it, all future convictions obtained in reliance on Trooper Fleisher's testimony are constitutionally infirm. That the Department of Justice wants to enable future prosecutors to rely on Trooper Fleisher's testimony without disclosing this Court's conclusions is deeply troubling.

3. The Government's Position Threatens the Due Administration of Justice.

Law enforcement witnesses are entitled to no special treatment in our court system. Courts make credibility findings every day that may devastate the careers, relationships, and futures of thousands of people. Often impassioned arguments may be made, and credible evidence mustered, to counter a court's findings. But ordinarily the government would scoff at the idea that the reasoned judgment of a federal court should be hidden from

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[12] The Department of Justice ("DOJ") has consistently resisted discovery and *Brady* reform efforts by saying, in essence, "trust us." *See, e.g.*, Testimony of D.A.G. James Cole Before Senate Judiciary Committee, June 6, 2012 ("Since [well-publicized discovery violations in *United States v.] Stevens*, the Department has … [been] enhancing the supervision, guidance, and training that it provides its prosecutors …. Accordingly, the Department does not believe that legislation is needed to alter the way discovery is provided in federal criminal cases."); *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-testifies-senate-judiciary-committee. Yet DOJ affirmatively asserts here that it would not disclose this Court's findings in future cases if the Court amends its opinion to allow the government to hide them.

public view to shield from consequences the person aggrieved by it.[13] The government does not explain why a law enforcement officer should receive that special favor – let alone why he should be spared consequences that the Constitution requires. *See* Section 2.

The Department of Justice's response to the Court's analysis is precisely backward. Rather than commit to rooting out racial bias in law enforcement, it asks the Court to conceal it. Rather than disavow reliance on law enforcement officers who are less than scrupulously truthful, it asks the Court to protect one. Rather than support the law enforcement community's efforts to discipline officers who violate their oath to support and defend our Constitution, it asks the Court to ensure that this officer remain on the force, and in the courts. Rather than affirm its commitment to seeking justice rather than obtaining convictions,[14] it asks the Court to facilitate future due process violations. And rather than acknowledge the salutary effect of daylight on the criminal justice system, it asks the Court to shroud its findings in darkness – in derogation of the First Amendment and the public interest.

The government's Motion should be denied.

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[13] Indeed, the government routinely seeks sentencing enhancements – if not perjury charges – based on adverse credibility findings against a defendant who testified at a suppression hearing.

[14] "The United States wins its point whenever justice is done its citizens in the courts." Inscription on the walls of the Department of Justice, quoted in *Brady*, 373 U.S. at 87.

Respectfully submitted,

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EXHIBIT A

DO NOT PUBLISH _____ XXX MAY BE PUBLISHED

Commonwealth v. $40,297.00 U.S. Currency – No. CI-14-09349 – Cullen, J. – October 5, 2015 – Civil – Forfeiture – Motion to Suppress – Fourth Amendment to the U.S. Constitution – Reasonable Suspicion – Fruit of the Poisonous Tree Doctrine –

A petition for forfeiture must include a notice to the claimant of the property notifying him or her that the failure to file an answer setting forth, *inter alia*, the claimant's right to possession of the property within 30 days after service of the petition will result in a decree of forfeiture being entered against the property.

Where procedural issues arise during forfeiture proceedings which are not amenable to resolution solely by application of the Forfeiture Act, the Rules of Civil Procedure may be utilized to regulate the practice and procedure. The Forfeiture Act, does not provide for the filing of a motion to suppress evidence illegally seized and, as one would expect, neither do the Rules of Civil Procedure.

The exclusionary rule of the Fourth Amendment to the United States Constitution applies in forfeiture proceedings and the Commonwealth may not introduce evidence that was illegally seized in violation of the Fourth Amendment's search and seizure requirements.

A parolee has a diminished expectation of privacy and the Fourth Amendment protections of a parolee are more limited than the protections afforded to the average citizen. The existence of reasonable suspicion to search "shall be determined in accordance with constitutional search and seizure provisions as applied by judicial decision," including, *inter alia*, the consideration of the following factors: the observation of agents, information provided by others, the activities of the offender, information provided by the offender, the experience of agents with the offender . . . the prior criminal and supervisory history of the offender. 61 Pa. C.S. § 6153(d)(6)(i), (ii), (iii), (iv), (v), (vii).

The "fruit of the poisonous tree" doctrine generally requires exclusion of evidence obtained from, or acquired as a consequence of, official lawless acts.

The Forfeiture Act permits the forfeiture of money if the Commonwealth proves that the money was furnished or intended to be furnished in exchange for a controlled substance, or represents proceeds traceable to such an exchange, or that the money was used or intended to be used to facilitate any violation of the Controlled Substance, Drug, Device and Cosmetic Act. The Commonwealth bears the initial burden of establishing a "sufficient or substantial nexus" between unlawful activity and the property subject to forfeiture.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

C I V I L

COMMONWEALTH OF PENNSYLVANIA , Plaintiff	:	
vs.	:	No. CI-14-09349
$40,297.00 U.S. Currency, Defendant	:	

OPINION AND ORDER

By Cullen, J.

On October 8, 2014, the Commonwealth filed a petition for forfeiture of $40,297.00 in U.S. currency that was seized on July 14, 2014, from the person and residence of Paul Alston, Jr. (Claimant). On October 22, 2014, Claimant, represented by counsel, filed an answer to the Commonwealth's petition.

After obtaining certain discovery from the Commonwealth, Claimant filed a motion to suppress[1] on January 2, 2015. On January 26, 2015, the Commonwealth filed an answer to the motion, and a motion to dismiss Claimant's motion. A hearing on the motion to suppress and the Commonwealth's forfeiture petition was held on March 13, 2015.

At the conclusion of the hearing, the Court ordered the notes of testimony transcribed and established a briefing schedule. All briefs have been received, and the matter is ready for decision.

Based on the evidence presented, and having resolved all issues of credibility, the Court finds the following facts.

[1]The motion to suppress was time stamped by the Prothonotary's office on January 2, 2015, but was not entered on the docket.

Factual Background

On June 27, 2014, Trooper Thomas Fleisher, on patrol on the Pennsylvania Turnpike, conducted a traffic stop for a windshield obstruction of a brown Honda Accord driven by Claimant. (N.T. 3/13/2015, p. 43). Trooper Fleisher noted that the vehicle was not registered to Claimant and that Claimant's license was suspended as well as expired. (*Id*.). He also learned that Claimant was on parole for violations of the Controlled Substance, Drug, Device and Cosmetic Act.[2] (*Id*.). At some point during the traffic stop, Claimant exited the vehicle and was patted down by Trooper Fleisher. (*Id*. at 45). Trooper Fleisher testified he conducted the pat down of Claimant "for my safety," but Claimant was not described as being aggressive and Trooper Fleisher did not testify that he suspected Claimant was armed. (*Id*. at 46, 47).

Trooper Fleisher felt what he immediately recognized to be currency in Claimant's pockets. (*Id*. at 47). The currency was removed from Claimant's pockets, but not seized. (*Id*. at 44). Claimant was cited for driving under suspension, the car was towed and Claimant was released from the scene with the tow truck. (*Id*. at 44-46, 48). The traffic stop lasted about an hour as Trooper Fleisher had to wait for a tow truck to arrive. (*Id*. at 46). Information about this traffic stop was subsequently relayed to Claimant's supervising parole agents. (*Id*. at 7, 44, 91, 116).

On July 14, 2014, at approximately 3:40 p.m., Agent Damien Mscisz and Agent Christopher Crawford of the Pennsylvania Board of Probation and Parole were driving east on Conestoga Street in Lancaster City, a location described by Agent Mscisz as a high drug trafficking area. (*Id*. at 10). Agent Mscisz's attention was drawn to a silver Corvette traveling in the opposite direction on Conestoga Street with its windows down and the driver was leaning out the window and waving to some people on the street

[2] 35 P.S. §§ 780-101 *et seq*.

corner. (*Id*.). Agent Crawford recognized the driver of the Corvette as Claimant. (*Id*. at 10, 11).

Agent Mscisz recalled that Supervisor David Rine had asked him for help in an upcoming search of Claimant's home. (*Id*. at 9, 11, 101, 102). The search of Claimant's home had been scheduled for July 16, 2014. (*Id*. at 116-17). Agent Mscisz also recalled an email he received from Trooper Noel Velez on June 30, 2014, which indicated that Claimant had been stopped on the Pennsylvania Turnpike driving another person's vehicle and heading in the direction of Philadelphia with $1,000 cash on his person. (*Id*. at 17). Claimant was cited for driving with a suspended license and was released from the scene and the car was towed. (*Id*.).

Agent Mscisz immediately telephoned Supervisor Rine, who was Claimant's supervising parole agent, and described his present sighting of Claimant. (*Id*. at 11). Supervisor Rine had previously visited Claimant's residence several times in May and June, 2014, and observed a lot of new shoes, new clothing and new furniture. Claimant was unemployed and receiving $530 a week in unemployment compensation. (*Id*. at 100, 101).

Both Supervisor Rine and Agent Mscisz knew that Claimant's license was suspended, and Supervisor Rine directed Agent Mscisz to have Claimant stopped. (*Id*. at 11, 29, 117, 102). Supervisor Rine, like Agent Mscisz, had also received Trooper Noel Velez's June 30, 2014, email about Claimant's traffic stop on the Pennsylvania Turnpike. (*Id*. at 116, 122). Supervisor Rine was in the Mount Joy area when

contacted by Agent Mscisz and began to travel towards Lancaster City. (*Id*. at 102-103).

Agent Mscisz contacted Lancaster Countywide Communications to obtain assistance in stopping Claimant. (*Id*. at 11). A short while later, Lancaster City Police Officer Phil Bernot encountered Claimant, on foot, leaving a Turkey Hill gas station on South Duke Street in the City of Lancaster. (*Id*. at 50, 51). Officer Bernot stopped Claimant and remained with him until Agents Mscisz and Crawford arrived. (*Id*. at 51). Officer Bernot testified that Claimant was "noticeably nervous," especially when Agent Mscisz and Agent Crawford arrived. (*Id*.). Officer Bernot cited Claimant for driving with a suspended license. (*Id*.).

At the Turkey Hill gas station, Agent Mscisz introduced himself to Claimant, told him he was being detained to investigate possible parole violations and placed him in handcuffs. (*Id*. at 13). Agent Mscisz asked Claimant if there was anything in his pockets. (*Id*.). Claimant replied that he had some money in his pockets. (*Id*.). When Agent Mscisz asked how much money was in his pockets, Claimant responded that he had around $5,600. (*Id*.). Agent Mscisz searched Claimant's pockets and retrieved what was later determined to be approximately $6,600. (*Id*. at 14). Claimant initially stated that he was employed, but seconds later he stated that he was unemployed but received $500 dollars a week in unemployment compensation. (*Id*. at 14). Claimant insisted that this sum was not a large amount of money to carry. (*Id*).

Agent Mscisz voiced his suspicions that the money had come from drug sales and stated that it would be standard procedure to confiscate the money and have it

tested for the presence of controlled substances. (*Id*. at 15). Claimant responded to the effect of, "You're right. Everything you are saying is right. You already know where the money came from and those kind of things." (*Id*. at 15).

When Supervisor Rine arrived at the Turkey Hill gas station, Claimant was already in custody. (*Id*. at 103). Supervisor Rine, Agent Mscisz and Agent Crawford traveled to South Christian Street where Claimant's silver Corvette was parked. (*Id*. at 31,103). While Agent Mscisz and Agent Crawford performed a search of the Corvette, Supervisor Rine began to receive phone calls and text messages from a cellular telephone that had been recovered from Claimant's person. (*Id*. at 103). Supervisor Rine viewed incoming text messages from one or two different numbers stating, "they didn't want anymore of the KO bags, the wanted purple bags, things of that nature." (*Id*. at 103-04). Supervisor Rine testified that, based on law enforcement reports he receives, KO is a brand of heroin. (*Id*. at 112-13).

Claimant was taken by Agents Mscisz and Crawford to the local parole office to be searched again because of his nervous demeanor. (*Id*. at 31). This search did not reveal any items of contraband. (*Id*. at 31).[3] Later that same day, at approximately 6:00 p.m, Agent Mscisz and other parole agents took Claimant from the parole office to his residence on South Railroad Avenue in Marietta, Lancaster County, where Agent

[3]Pursuant to information relayed to Officer Bernot by employees of the Turkey Hill gas station, and by Officer Bernot to Agent Mscisz, a search of a Honda at the gas station was conducted resulting in the seizure of a baggie of suspected marijuana. Claimant's connection to the Honda and its contents, if any, is not indicated in the record. (*Id.* at 17, 52-53).

Mscisz and the other parole agents performed a search of the premises for contraband. (*Id*. at 17, 36).

During the search of the property, Agent Mscisz noticed that there was new looking leather furniture, boxes of new shoes and new clothes with the tags still attached in "almost every room in the house". (*Id*. at 19). There were also a few all-terrain vehicles in the garage. (*Id*.).

In a bedroom, Agent Mscisz saw a razor on top of a night stand and the residue of a flaky white substance. (*Id*. at 19). Agent Mscisz witnessed a Susquehanna Regional Police Officer apply a testing chemical to the white flaky substance which turned purple. (*Id*. at 37).[4] Inside the same night stand, Agent Mscisz discovered rubber gloves, small rubber bands and a white grocery bag that had a large amount of money in it. (*Id*. at 19). The money was prepared in folds, and the folds were rubber banded together. (*Id*.). There have been several instances in Agent Mscisz's career where, upon performing a parole search, he has discovered money arranged in a similar fashion in the presence of narcotics. (*Id*. at 22).

Claimant agreed to have his home searched by a K-9 unit. (*Id*. at 32-33). At around 7:00 p.m., Claimant signed a consent form for a K-9 search. (*Id*.). Within a half-hour, Sergeant Aaron Szulborski and K-9 Bayne from the Manheim Borough Police Department began a search of the premises. (*Id*. at 54-56). Bayne is trained to

[4]The significance of this change in color, if any, was not explained in the record.

detect cocaine, heroin, marijuana, methamphetamine and ecstasy. (*Id*. at 55). Bayne is trained to alert or scratch the area where he locates narcotics. (*Id*. at 56).

Parole agents placed the money discovered in the night stand onto a bed in the basement before the K-9 search began. (*Id*. at 57). Sergeant Szulborski had Bayne search the basement like any other room and he did not direct Bayne to search the money in particular. (*Id*.). Nonetheless, Bayne jumped up onto the bed and began to scratch at the money. (*Id*.). Sergeant Szulborski opined that Bayne was scratching the money because he detected the odor of narcotics on the money. Bayne also alerted on either a washer or a dryer in the basement and on dressers in the upstairs bedrooms. (*Id*. at 58-59).

After the K-9 search was completed at approximately 9:30 p.m, Claimant was taken back to the parole office. (*Id*. at 23). Claimant repeatedly insisted that the amount of money that had been recovered "wasn't a big deal for him," and that he had been saving it from a job in Hazelton where he was making $60,000 a year. (*Id*. at 24). When asked by Agent Mscisz how he was able to save so much money, Claimant replied that the key is "living beneath your means." (*Id*.).

Staff Sergeant Jennifer Marsh of the Counterdrug Joint Task Force of the Pennsylvania Army National Guard tested the money seized in this case with an ion scan machine. (*Id*. at 63-64). Staff Sergeant Marsh is certified on two different ion scan models and has performed approximately 350 ion scans. She has testified in at least eight Pennsylvania counties as an expert in the use of the ion scan device and interpretation of ion scan test results. (*Id*. at 64-66).

The ion scan of the money seized from Claimant's person and residence yielded a positive result for the presence of procaine at a level of 171 parts per billion. (*Id*. at 73, 81). Staff Sergeant Marsh testified that procaine is a cutting agent used with cocaine. (*Id*. at 73). The ion scanner is programmed by its manufacturer to alert for the presence of procaine if a sample higher than 50 parts per billion enters the machine. (*Id*. at 81, 87). This 50 parts per billion threshold is never changed by the operator of the machine. (*Id*. at 87). As part of her duties, Staff Sergeant Marsh tests currency in banks and in casinos with the ion scanner. (*Id*. at 80). She has found procaine to be present on suspected drug currency, but has never found procaine to be present on any currency tested from banks or casinos. (*Id*. at 74, 76). Staff Sergeant Marsh also testified that procaine could be present on currency if a person's hands touch the currency after having already touched procaine. (*Id*. at 77-78).

Noel Velez, a member of the Pennsylvania State Police with 20 years experience in investigating narcotics offenses, testified that procaine is a substance commonly used as a cutting agent by persons who combine it with cocaine and sell the resultant mixture. (*Id*. at 88-90, 92-94). He testified that procaine is used legitimately by dentists as a numbing agent. (*Id*. at 92).

The record does not indicate that Claimant was charged with any criminal offense or any violation of his parole as a result of these events.

Discussion

Prior to the hearing, Claimant filed a motion to suppress the evidence relied on by the Commonwealth to warrant forfeiture of the currency seized as a result of this incident. The Commonwealth argues that this motion is untimely, as the suppression motion should have been raised in Claimant's new matter. Claimant argues that the motion should be treated as a motion in limine.

A petition for forfeiture must include a notice to the claimant of the property notifying him or her that the failure to file an answer setting forth, *inter alia*, the claimant's right to possession of the property within 30 days after service of the petition will result in a decree of forfeiture being entered against the property. 42 Pa. C.S. § 6802 (b). Claimant's answer, filed on October 22, 2014, was filed within 30 days of the filing of the Commonwealth's petition and states, in relevant part, that "said property was seized by the Commonwealth and its Agents but not pursuant to any legal justification." (Ans., ¶ 2). Claimant's motion to suppress was filed on January 2, 2015, after discovery responses were received from the Commonwealth on December 30, 2014. The motion was filed approximately six days before the hearing was originally scheduled[5] and sets forth in detail the factual basis for challenging the legality of the Commonwealth's seizure of the currency.

The Pennsylvania Supreme Court has held that where procedural issues arise during forfeiture proceedings which are not amenable to resolution solely by application of the Forfeiture Act, the Rules of Civil Procedure may be utilized to regulate the

[5]The hearing was scheduled originally for January 8, 2015, and was subsequently continued at the request of the parties until March 13, 2015.

practice and procedure. *Commonwealth v. 605 University Drive*, 104 A.3d 411, 426 (Pa. 2014). The Forfeiture Act, 42 Pa. C.S. §§ 6801 *et seq*., does not provide for the filing of a motion to suppress evidence illegally seized and, as one would expect, neither do the Rules of Civil Procedure.

The Commonwealth asserts that the motion to suppress is untimely because it was raised after the pleadings closed. Leaving aside the question of what are "pleadings" in a forfeiture procedure, Claimant could have raised the issue in his answer, which he arguably did, or in new matter which allows a party to, ". . . set forth as new matter any other material facts which are not merely denials of the averments of the proceeding pleading." Pa. R.C.P. 1030(a).

Claimant argues that his motion should be viewed as a motion in limine and that it was timely filed under the Local Rules.

While the Commonwealth's position is better developed than Claimant's, in the absence of a rule of court or appellate guidance, reasonable minds could differ as to the appropriate method to raise a suppression issue in a forfeiture case. Under such circumstances, the Court will be guided by Pa. R.C.P. 126. To the extent Claimant has erred in the procedural path taken, the Commonwealth has not made any claim or showing of unfair prejudice. Accordingly, the Court will treat his suppression motion as having been timely filed.

The exclusionary rule of the Fourth Amendment to the United States Constitution applies in forfeiture proceedings and the Commonwealth may not introduce evidence

that was illegally seized in violation of the Fourth Amendment's search and seizure requirements. *605 University Drive*, 104 A.3d at 418, 424.

A parolee has a diminished expectation of privacy and the Fourth Amendment protections of a parolee are more limited than the protections afforded to the average citizen. *Commonwealth v. Hughes*, 575 Pa. 447, 457, 836 A.2d 893, 899 (Pa. 2003) (citations omitted). Section 6153 authorizes parole agents to search an offender "if there is reasonable suspicion to believe that the offender possesses contraband or other evidence of violations of the conditions of supervision." 61 Pa. C.S. § 6153(d)(1)(I). A search of an offender's property may be conducted "if there is reasonable suspicion to believe that the real or other property in possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision." 61 Pa. C.S. § 6153(d)(2). A search of a parolee's real property is reasonable only where reasonable suspicion of a parole violation exists and the search was reasonably related to the duty of the parole officer, even if the parolee has given written consent to the search. *Commonwealth v. Hunter*, 963 A.2d 545, 553 (Pa. Super. 2008) (citing *Commonwealth v. Hughes*, 575 Pa. 447, 458, 836 A.2d 893, 899 (2003); See also *Commonwealth v. Williams*, 547 Pa. 577, 588-89, 692 A.2d 1031, 1036-37 (Pa. 1997).

The existence of reasonable suspicion to search "shall be determined in accordance with constitutional search and seizure provisions as applied by judicial decision," including, *inter alia*, the consideration of the following factors: the observations of agents, information provided by others, the activities of the offender,

information provided by the offender, the experience of agents with the offender . . . the prior criminal and supervisory history of the offender. 61 Pa. C.S. § 6153 (d)(6)(i), (ii), (iii), (iv), (v), (vii).

Reasonable suspicion must be based on specific and articulable facts and reasonable inferences drawn from those facts, and it must be based on the totality of the circumstances in light of an officer's experience. *Commonwealth v. Williams*, 980 A.2d 667, 671 (Pa. Super. 2009) (citation omitted). Parole officers need not personally observe an offender engage in illegal conduct in order for reasonable suspicion to be present. *Commonwealth v. Altadonna*, 817 A.2d 1145, 1152, (Pa. Super. 2003).

The "fruit of the poisonous tree" doctrine generally requires exclusion of evidence obtained from, or acquired as a consequence of, official lawless acts; it does not exclude evidence obtained from an independent source. *Commonwealth v. Abbas*, 862 A.2d 606, 610 (Pa. Super. 2004) (citing *Commonwealth v. Brown*, 700 A.2d 1310, 1318 (Pa. Super. 1997)). If discovery of evidence can be traced to a source independent of the initial illegality, suppression is not mandated. *Id*. at 1318 (citing *Commonwealth v. Ariondo*, 580 A.2d 341, 347 (Pa. Super. 1990), *appeal denied*, 527 Pa. 628, 592 A.2d 1296 (1991)). Claimant seeks to suppress evidence of the money that was discovered on his person and in his residence on July 14, 2014, on the basis that this money was the fruit of his allegedly unconstitutional turnpike detention more than two weeks earlier, as well as his unlawful detention on July 14, 2014, by Agents Mscisz and Crawford.

The record does not support the conclusion that Claimant's turnpike detention was supported by reasonable suspicion or probable cause. Although the vehicle stop was based on a claim of a windshield obstruction, there was no testimony from Trooper Fleisher about his actual observations of the object or objects which were obstructing the windshield of the vehicle Claimant was driving. (See N.T. 3/13/2015, pp. 41-48). The Pennsylvania Supreme Court has held under similar circumstances that such a lack of testimony or evidence is insufficient to support reasonable suspicion of a windshield obstruction violation. *See Commonwealth v. Holmes*, 609 Pa.1, 15-17, 14 A.3d 89, 97-99 (2011) (insufficient evidence to support reasonable suspicion of a windshield obstruction violation where a police officer testified that the defendant was pulled over for having "objects hanging from the rear view mirror which were obstructing the driver's view," but the officer could not remember what he saw, and the objects were not seized and were not available for the court's inspection).

There was also no testimony to establish reasonable suspicion that Claimant may have been armed and dangerous as to justify a pat down. *See Commonwealth v. Hicks*, 253 A.2d 276, 279 (Pa. 1969) (police may frisk an individual for weapons if articulable facts exist indicating that the person may be armed and dangerous); *See also Commonwealth v. Zhahir*, 561 Pa. 545, 554, 751 A.2d 1153, 1158 (Pa. 2000) (in assessing reasonableness of police officer's decision to frisk, the court does not consider the officer's "unparticularized suspicion or hunch"). Trooper Fleisher admitted that Claimant did not do anything aggressive, although he described Claimant as "aggressive, you know, in nature". (N.T. 3/13/2015, pp. 46-47). Trooper Fleisher's

sole explanation for the pat down was that Claimant was standing near him. (*Id*. at 46). Once Trooper Fleisher felt Claimant's pockets, he immediately knew what he was feeling was money. (*Id*. at 47). Therefore, there was no reason to remove it from his person and count it.

While the evidence of new shoes, clothing and furniture and the ATVs at the residence Claimant shared with an unnamed woman was known to Supervisor Rine prior to the incident on the Pennsylvania Turnpike, no action was taken in response to this information prior to the illegal traffic stop and search of June 27, 2014. It is apparent, therefore, that the information obtained from this stop motivated and tainted all of the parole agents' subsequent decisions.[6]

Absent this evidence from the turnpike stop and search, the record is insufficient to establish reasonable suspicion to stop, detain and search Claimant on July 14, 2014, for evidence of parole violations.

Agents observed Claimant driving in a high drug trafficking area of Lancaster City while having a suspended license. (*Id.* at 8, 10-11, 29). Claimant was also waving to persons on a street corner. (*Id*. at 10). The decision was made at that time by Supervisor Rine to stop and search him. A short time later, Claimant was found by Officer Bernot at the Turkey Hill gas station. (*Id*. at 50, 51). Although Supervisor Rine had earlier on home visits in May and June seen many new clothes, shoes and furniture as well as ATVs at the residence where Claimant was living, the record does not reflect

[6]Although Claimant was known to have been cited for driving under suspension or without a license, no action was taken by his supervising parole agent with respect to Claimant's parole status.

who purchased or owned these items. (*Id*. at 100-101). Supervisor Rine learned that Claimant and his girlfriend, who had five or six children, lived in the home together, and Claimant stated he had a high paying job prior to being unemployed. (*Id*. at 101). Despite having talked to Claimant about "financial things," "such as paying rent," Supervisor Rine did not testify specifically as to any of Claimant's living expenses or to his girlfriend's income level. (*Id*. at 101).

Once Agent Mscisz approached Claimant, he handcuffed him. (*Id*. at 13). Agent Mscisz told Claimant that he was being searched to investigate "possible parole violations," but Agent Mscisz did not testify what violations of parole Claimant was suspected of committing. (*Id*.).

These circumstances are insufficient to establish reasonable suspicion to believe that Claimant possessed contraband or evidence of parole violations so as to justify his detention. Although Claimant was driving with a suspended license, there is no indication Officer Bernot was aware of this fact until he was told by parole agents to stop Claimant. While parole agents may have guessed that Claimant was incapable of affording the merchandise present in the home where he lived, this unsubstantiated suspicion does not reasonably lend itself to the conclusion that since Claimant was seen driving in a high drug area of the City, he must have contraband or evidence of parole violations on his person. Parole agents did not observe Claimant do anything for which he would be charged with a parole violation while in the City of Lancaster. In the absence of admissible evidence tending to show that Claimant was engaged in illegal activity, parole agents' seizure and search of Claimant's person and vehicle was

based on a mere hunch. Under such circumstances, suppression is warranted. *605 University Drive*, *supra*.

The subsequent search of Claimant's home and the discovery of approximately $33,697 arose as a direct consequence of Claimant's unconstitutional seizure and will be suppressed as the fruit of the poisonous tree.

The Forfeiture Act permits the forfeiture of money if the Commonwealth proves that the money was furnished or intended to be furnished in exchange for a controlled substance, or represents proceeds traceable to such an exchange, or that the money was used or intended to be used to facilitate any violation of the Controlled Substance, Drug, Device and Cosmetic Act. *Commonwealth v. $9,000 U.S. Currency*, 8 A.3d 379, 383 (Pa. Cmwlth. 2010) (citing 42 Pa.C.S. § 6801(a)(6)(i)(A)(B)). The Commonwealth bears the initial burden of establishing a "sufficient or substantial nexus" between unlawful activity and the property subject to forfeiture. *Id*. at 384 (citations omitted). The Commonwealth must prove this nexus by a preponderance of the evidence, or a "more likely than not" standard. *Id.* (citations omitted). There is no requirement that illegal drugs be present at the time of seizure; instead, circumstantial evidence may suffice to establish a party's involvement in drug activity. *Commonwealth v. $6,425.00 Seized From Esquilin*, 583 Pa. 544, 555, 880 A.2d 523, 530 (2005). For property to be forfeitable, neither a criminal prosecution nor a conviction is required. *Id*. at 530.

If the Commonwealth establishes a substantial nexus, then the burden shifts to the person opposing the forfeiture to prove that he or she owns the money, he or she lawfully acquired it, and he or she did not use or possess it for unlawful purposes.

$9,000 U.S. Currency, 8 A.3d at 384 (citing *Commonwealth v. $16,208.38 U.S. Currency Seized From Holt*, 635 A.2d 233, 238 (Pa. Cmwlth. 1993)).

Since suppression of the information from the turnpike stop and Claimant's subsequent stop and detention on July 14 is required, the money seized and the results of all testing of it must be excluded. In the absence of such evidence, the Commonwealth cannot prove a substantial nexus between unlawful activity and the money. Therefore, the Commonwealth's petition for forfeiture will be denied.[7]

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
C I V I L

COMMONWEALTH OF PENNSYLVANIA, Plaintiff	:	
vs.	:	No. CI-14-09349
$40,297.00 U.S. Currency, Defendant	:	

O R D E R

AND NOW, this 5th day of October, 2015, upon consideration of the Commonwealth's petition for forfeiture, the motion to suppress filed by Claimant, the evidence at the hearing and the post-trial submissions of Claimant and the Commonwealth, it is ordered that:

1. Claimant's motion to suppress is granted.

[7] As in any case involving suppression of evidence, the Court addresses only the legality of the conduct of the law enforcement officers in obtaining the challenged evidence. The Court is not required to and does not express any opinion with respect to the legality of a defendant's or a claimant's conduct.

2. The Commonwealth's petition for forfeiture is denied.

BY THE COURT:

JAMES P. CULLEN, JUDGE

Attest:

Copies to:
Robert B. Stewart, III, Esquire
Office of the Attorney General
William Braught, Esquire

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN PURCELL	:	**CIVIL ACTION NO.**
and KEVIN PORTER	:	**11-CV-07803**
Plaintiffs,	:	
	:	
v.	:	**JURY TRIAL DEMANDED**
	:	
THOMAS FLEISHER	:	
	:	
Defendant	:	

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

This is a civil rights action seeking monetary damages, attorney's fees, litigation costs, and other relief based upon causes of action brought under 42 U.S.C. § 1983 and state common law, arising from events that occurred on September 24, 2010, when Defendant, a Pennsylvania state trooper who at all relevant times was acting under color of state law, unlawfully stopped and strip-searched Plaintiffs.

II. PARTIES

1. Plaintiff, Steven Purcell ("Purcell"), is an adult individual and a citizen of the Commonwealth of Pennsylvania who resides at 527 Berwyn Baptist Road, Berwyn, Pennsylvania, 19132.

2. Plaintiff, Kevin Porter ("Porter"), is an adult individual and a citizen of the Commonwealth of Pennsylvania who resides at 865 Buttonwood Avenue, Spring City, Pennsylvania, 19475.

3. Defendant, Thomas Fleisher ("Defendant"), is an adult individual and a citizen of the Commonwealth of Pennsylvania who at all relevant times was employed as a state trooper by the Pennsylvania State Police. His badge number is 10581.

4. At all relevant times, Defendant acted under color of state law.

5. Plaintiffs bring this action against Defendant in his individual and official capacities.

III. JURISDICTION AND VENUE

6. On or about November 30, 2011, Plaintiffs originally filed this action against Defendant in the Court of Common Pleas of Philadelphia County.

7. On or about December 23, 2011, Defendant removed the action to this Court pursuant to 28 U.S.C. § 1441, *et seq.*, because the Complaint alleges, *inter alia*, violations of Plaintiffs' rights under 42 U.S.C. § 1983.

8. This Court has jurisdiction over Plaintiffs' federal statutory claims pursuant to 28 U.S.C. §§ 1331 and 1343(a).

9. This Court has supplemental jurisdiction over Plaintiff's state common law claims pursuant to 28 U.S.C. § 1367(a).

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because it is believed that Defendant resides in this district, and the events and occurrences giving rise to this action occurred here.

IV. FACTUAL BACKGROUND

11. On September 24, 2010, Plaintiffs were in North Philadelphia, Pennsylvania, near the Temple University campus.

12. In the afternoon, Plaintiffs left the Temple University area and headed toward U.S. Route 1 ("Route 1") in a vehicle driven by Purcell (Plaintiffs' vehicle). Porter was a passenger in Plaintiffs' vehicle.

13. As they drove toward Route 1, Plaintiffs travelled through sections of Philadelphia that are well known to be predominately populated by African Americans, Hispanics and other ethic and racial minorities. Plaintiffs are Caucasian.

14. After driving westbound on Route 1 for a short period of time, Plaintiffs observed that a Pennsylvania state trooper vehicle was directly behind them.

15. Defendant, who was driving the said Pennsylvania state trooper vehicle, activated his police lights and signaled to Plaintiffs to pull over. Purcell immediately pulled into a gas station near the intersection of Route 1 and Fox Street in Philadelphia.

16. Defendant got out of his vehicle, approached Plaintiffs' vehicle, and requested Purcell's driver's license and vehicle registration.

17. While Purcell retrieved the requested documents, Defendant revealed the true reason and motivation for stopping Plaintiffs, who had not committed any traffic violations: Defendant told Plaintiffs that it was abnormal for two Caucasian males to be driving through a black neighborhood in North Philadelphia.

18. Defendant, nevertheless, claimed that he had stopped Purcell for "driving too close" to the vehicle in front of him (the "Charge").

19. The Charge was false and pre-textual because Purcell was, at all relevant times, driving within a safe and lawful distance from the vehicles ahead of him.

20. The Charge was also implausible due to the volume of traffic on Route 1 at the time, which forced other vehicles traveling in the same direction as Plaintiffs to move at a uniformly slow pace. Defendant stopped none of these other vehicles.

21. Upon receiving Purcell's license and registration, Defendant went back to his vehicle.

22. A few minutes later, Defendant returned to Plaintiffs' vehicle and, without explanation, ordered Purcell to exit his vehicle and stand behind it.

23. Without reasonable suspicion or probable cause that a crime had been committed, or a reasonable belief that Purcell posed a danger to him, Defendant searched Purcell once he was out of his vehicle. Defendant uncovered nothing suspicious or illegal on Purcell's person during the search.

24. Subsequently, Defendant handed Purcell a written warning for "Following Too Closely."

25. Defendant then immediately began to interrogate Purcell about his whereabouts that day.

26. Although the search and interrogation of Purcell was fruitless, Defendant searched and interrogated Porter, also without reasonable suspicion or probable cause that a crime had been committed, or a reasonable belief that Porter posed a danger to him. Again, Defendant uncovered nothing suspicious or illegal in his search, nor did Defendant's interrogation of Porter provide him with any incriminating information about Plaintiffs.

27. After Defendant had finished searching and interrogating Plaintiffs, he was visibly irritated and frustrated that he had not uncovered anything unlawful, let alone criminally suspicious.

28. Defendant told Purcell that he would have to search Plaintiffs' vehicle, and he called State trooper Guy Lenior ("Trooper Lenior") for backup.

29. As soon as Trooper Lenior arrived at the scene, Defendant began to search the interior of Plaintiffs' vehicle; in furtherance thereof, Defendant sifted, rummaged and haphazardly tossed around Plaintiffs' belongings.

30. The search of Plaintiffs' vehicle was without reasonable suspicion or probable cause that a crime had been committed, or a reasonable belief that Plaintiffs posed a danger to Defendant or Trooper Lenior.

31. Furthermore, any verbal consent by Plaintiffs to search Plaintiffs' vehicle was tainted and negated by Defendant's illegal stop of Plaintiffs.

32. Defendant and Trooper Lenior found nothing suspicious or illegal as a result of their search of Plaintiffs' vehicle.

33. In connection to the search of Plaintiffs' vehicle, Defendant repeatedly uttered profanity while displaying a hostile and aggressive tone and manner toward Plaintiffs.

34. In light of the foregoing irrational, outrageous and inexplicable behavior of Defendant, Plaintiffs were fearful of Defendant, an armed officer.

35. When Defendant and Trooper Lenior were finished searching Plaintiffs' vehicle, they made no attempt to clean up the mess they had created. Plaintiffs' personal belongings and other items were scattered throughout Plaintiffs' vehicle.

36. After Defendant's fruitless search of Plaintiffs' vehicle was completed, Defendant repeatedly told Plaintiffs that he knew that they were lying and he demanded that they tell him the truth. Defendant also insisted, without foundation, that Plaintiffs were in possession of illegal narcotics.

37. For example, Defendant told Purcell: that Purcell had "30 seconds to start being honest"; "just listen, I'll tell you when to talk"; "your stories suck"; "I don't know what you guys are up to down here"; "you have about 20 seconds, alright, to let me know what you have, cause I know you came down here to buy drugs, I know it, let's be honest"; "I know where you guys hide the shit, it's under your balls, it's up your ass, in your socks, in your shoes, wherever"; "quite frankly, I think you guys aren't being honest with me"; "I'm starting to get angry because you're wasting my time", "if I have to put you in my car to strip search you, I will"; "let's go pal, in my car [to be strip searched]."

38. Likewise, Defendant told Porter: "listen to me, your stories suck"; "maybe you're down in the city buying dope, maybe you're not"; "don't lie to me anymore"; "you're lying, stop lying"; "yes you are [lying], I can tell when you're lying"; "listen, I know where you hide it, up your butt, under your balls, I've seen it all, so I'm not going to be surprised"; "listen, you're nervous"; "start being honest with me cause you're starting to piss me off"; "can you hear it in my voice that I'm getting pissed, then start being honest with me."

39. As Defendant continued to address Plaintiffs, the tone of Defendant's voice became more abrupt, aggressive and accusatory.

40. Plaintiffs, now visibly frightened by Defendant's aggressive, hostile and irrational behavior, each candidly and truthfully stressed over and over again to Defendant that they had done nothing wrong or illegal.

41. Nevertheless, without reasonable suspicion or probable cause that a crime had been committed, or a reasonable belief that Plaintiffs posed a danger to Defendant or Trooper Lenior, Defendant told Plaintiffs that he was going to "strip search" them.

42. Based on Defendant's abrasive, obnoxious and fanatical behavior, as well as his misuse of authority, Plaintiffs were fearful for their well-being and believed they had no choice but to acquiesce to strip searches or face harmful and/or violent action from Defendant.

43. Defendant never advised Plaintiffs that they had any choice but to submit to be strip searched.

44. On the other hand, Defendant used deceit, trickery, threats and coercion to (a) make Plaintiffs believe that he had the legal right to strip search Plaintiffs, with or without their consent and, (b) to make Plaintiffs fear for their safety.

45. For example, prior to strip-searching Plaintiffs, and without asking for their consent to be strip-searched, Defendant stated: "if I have to put you in my car to strip search you, I will"; "alright, who is going to my car first"; and "you say you have nothing in there . . . alright, hop in [the trooper vehicle] and show me."

46. Defendant made these statements to deceive and trick Plaintiffs into believing that he had the legal right to search them without their consent, and to make them fear that since Defendant was prepared to violate the law by strip-searching them without their consent, he was therefore capable of worse acts.

47. After threatening Plaintiffs, Defendant first ordered Porter to get into the back of Defendant's state trooper vehicle.

48. After entering Defendant's vehicle, Defendant commanded Porter to remove all of his clothing.

49. The door of Defendant's vehicle remained open throughout his strip search of Porter, who was naked and visibly exposed to anyone who happened to be within eyesight of the gas station parking lot and/or Defendant's vehicle.

50. While Porter was naked and lying on his back in Defendant's vehicle, Defendant ordered Porter to lift his testicles while Defendant visibly inspected him. Again, Defendant found nothing incriminating, suspicious or illegal.

51. Defendant next ordered Porter to turn around and spread his buttocks so that his anus was visible. The frightened Porter again obeyed, and again, Defendant found nothing incriminating, suspicious or illegal.

52. After Defendant had completed his humiliating, abusive and unwarranted strip-search of Porter, he ordered Porter out of Defendant's vehicle while Porter was only partially dressed.

53. As a result of Defendant's willful, wanton, intentional, malicious, outrageous and reckless conduct, Porter was caused to suffer severe embarrassment, humiliation, fright, anxiety, mental anguish and emotional distress.

54. Next, Defendant ordered Purcell to get into the back of Defendant's vehicle.

55. After entering Defendant's vehicle, Defendant similarly ordered Purcell to remove all of his clothing, lie on his back, lift his testicles, and turn around and spread his buttocks.

56. Defendant again found nothing suspicious or illegal during his strip search of Purcell.

57. Defendant then similarly ordered Purcell out of his state trooper vehicle while Purcell was still putting on his clothing and was only partially dressed.

58. As a result of Defendant's willful, wanton, intentional, malicious, outrageous and reckless conduct, Purcell was caused to suffer severe humiliation, embarrassment, fright, anxiety, mental anguish and emotional distress.

59. Defendant's strip searches of Plaintiffs were conducted without their consent and without reasonable suspicion or probable cause that a crime had been committed, or a reasonable belief that Plaintiffs posed a danger to Defendant. Furthermore, any verbal consent by Plaintiffs to be searched was tainted and negated by Defendant's illegal stop of Plaintiffs and his coercion, threats, deceit and trickery.

60. After his strip searches of Plaintiffs, Defendant then went back to his vehicle and drove away from the scene.

COUNT I

PURCELL V. DEFENDANT
42 U.S.C. § 1983 – UNLAWFUL DETENTION

61. Purcell incorporates by reference the averments contained above as if set forth fully and at length herein.

62. The relevant portion of the "Following Too Closely" statute reads as follows:

> (a) General Rule.—The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the highway.

75 Pa. C.S. § 3310.

63. Defendant did not have a reasonable or lawful basis to stop Purcell for violating 75 Pa. C.S. § 3310, and Purcell did not violate the statute.

64. Defendant did not have a reasonable or lawful basis to stop Purcell for violating any other state or federal law, or for any other legitimate or lawful reason.

65. After being illegally stopped by Defendant, Purcell reasonably believed that he was incapable of unilaterally terminating his encounter with Defendant.

66. The acts, conduct and actions of Defendant, described herein, constituted an unlawful detention of Purcell.

67. The unlawful detention lasted from the time of the initial traffic stop until Defendant left the gas station parking lot.

68. The acts, conduct and actions of Defendant, acting as aforesaid, caused Purcell to suffer a deprivation of his right to be free from an unlawful detention under the Fourth and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. § 1983.

69. As a direct result of said deprivation, Purcell was caused to suffer severe humiliation, embarrassment, fright, anxiety, mental anguish and emotional distress.

70. The unlawful acts, conduct and actions of Defendant were willful, wanton, intentional, deliberate and/or committed with reckless disregard for and reckless indifference to the rights of Purcell, thereby entitling Purcell to an award of punitive damages.

71. As a further result of the unlawful acts, conduct and actions of Defendant, Purcell is entitled to an award of reasonable attorney's fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

WHEREFORE, Plaintiff Purcell demands judgment against Defendant in excess of $50,000, consisting of compensatory damages, punitive damages, reasonable attorneys' fees, litigation costs, prejudgment interest, and any other such relief that the Court deems just and appropriate.

COUNT II

PLAINTIFF PORTER V. DEFENDANT
42 U.S.C. § 1983 – UNLAWFUL DETENTION

72. Porter incorporates by reference the averments contained above as if set forth fully and at length herein.

73. Porter was subject to a stop by Defendant by virtue of the fact that Porter was a passenger in Plaintiffs' vehicle.

74. Defendant did not have a reasonable or lawful basis to stop Plaintiffs' vehicle or Plaintiffs.

75. After being illegally stopped by Defendant, Purcell reasonably believed that he was incapable of unilaterally terminating his encounter with Defendant.

76. The acts, conduct and actions of Defendant constituted an unlawful detention of Porter.

77. The unlawful detention lasted from the time of the initial traffic stop until Defendant left the gas station parking lot.

78. The acts, conduct and actions of Defendant, acting as aforesaid, caused Porter to suffer a deprivation of his right to be free from an unlawful detention under the Fourth and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. § 1983.

79. As a direct result of said deprivation, Porter was caused to suffer severe humiliation, embarrassment, fright, anxiety, mental anguish and emotional distress.

80. The unlawful acts, conduct and actions of Defendant were willful, wanton, intentional, deliberate and/or committed with reckless disregard for and reckless indifference to the said rights of Porter, thereby entitling Porter to an award of punitive damages.

81. As a further result of the unlawful acts, conduct and actions of Defendant, Porter is entitled to an award of reasonable attorney's fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

WHEREFORE, Porter demands judgment against Defendant in excess of $50,000, consisting of compensatory damages, punitive damages, reasonable attorneys' fees, litigation costs, prejudgment interest, and any other such relief that the Court deems just and appropriate.

COUNT III

PLAINTIFFS v. DEFENDANT
42 U.S.C. § 1983 – EQUAL PROTECTION AND RACIAL PROFILING

82. Plaintiffs incorporate by reference the averments contained above as if set forth fully and at length herein.

83. Plaintiffs, by virtue of their race, are members of a protected class for purposes of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

84. Defendant targeted Plaintiffs for a traffic stop and the subsequent unlawful search and detention because they are Caucasians who had driven through a neighborhood predominated by African Americans and other minorities.

85. Although Defendant stated that he stopped Purcell for driving too close to the automobile that was ahead of Plaintiffs on U.S. Route 1, that explanation was false and pretextual.

86. To the contrary, the very reason that Plaintiffs were stopped was because they are Caucasians.

87. Defendant, using a discriminatory rationale, posited that Caucasians, such as Plaintiffs, would only be in a neighborhood populated by minorities if they were involved in criminal activity. Defendant did not stop Plaintiffs because they actually fit the description of persons who had allegedly committed criminal acts. Furthermore, Defendant did not stop similarly-situated African American, Hispanic or other minority drivers who, like Plaintiffs, were driving within a safe distance from the cars ahead of them.

88. As a direct result of Defendant's conduct, Plaintiffs suffered a deprivation of their rights to be free from racial profiling (*i.e.*, a racially-motivated traffic stop) guaranteed by the Equal Protection Clause of Fourteenth Amendment to the United States Constitution.

89. The unlawful acts, conduct and actions of Defendant were willful, wanton, intentional, deliberate and/or committed with reckless disregard for and reckless indifference to the rights of Plaintiffs, thereby entitling Plaintiffs to an award of punitive damages.

90. As a further result of the unlawful acts, conduct and actions of Defendant, Plaintiffs are entitled to an award of reasonable attorney's fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

WHEREFORE, Plaintiffs demand judgment against Defendant in excess of $50,000, consisting of compensatory damages, punitive damages, reasonable attorneys' fees, litigation costs, prejudgment interest, and any other such relief that the Court deems just and appropriate.

COUNT IV

PLAINTIFFS v. DEFENDANT
42 U.S.C. § 1983 – UNLAWFUL SEARCH

91. Plaintiffs incorporate by reference the averments contained above as if set forth fully and at length herein.

92. Defendant lacked probable cause to perform a warrantless strip search of Plaintiffs.

93. The strip searches were not performed in good faith, in that Defendant knew that Plaintiffs did not possess any illegal substances.

94. The strip searches occurred after Defendant had searched Plaintiffs and after Defendant and Trooper Lenior had searched Plaintiffs' vehicle. None of the searches produced any incriminating, suspicious or illegal materials or evidence.

95. Neither the initial illegal stop of Plaintiffs, nor the subsequent interrogations of Plaintiffs gave Defendant reasonable suspicion or probable cause that a crime had been committed, or a reasonable belief that Plaintiffs posed a danger to Defendant or Trooper Lenior.

96. Defendant performed the strip searches solely to cause to humiliate, embarrass and frighten Plaintiffs.

97. The strip searches were performed in the back of Defendant's vehicle with the door open, wide. Defendant's vehicle was parked in a public gas station and Plaintiffs were exposed to, and in plain view, of members of the public.

98. Defendant's conduct in performing the strip searches was not reasonably related to any legitimate governmental objective.

99. Defendant's strip searches of Plaintiffs were grossly intrusive and unreasonable under the totality of circumstances.

100. Plaintiffs did not give Defendant consent to perform a strip search.

101. Even if Plaintiffs gave Defendant verbal "approval" to conduct the strip searches, such verbal "approval" was not given voluntarily under the totality of the circumstances because it was obtained by means of threats, coercion, misrepresentation, deception and trickery; and it was tainted by the unlawful nature of Defendant's detention of Plaintiffs.

102. Further, Defendant never advised Plaintiffs that they had any choice but to submit to be strip searched.

103. The acts, conduct and actions of Defendant, acting as aforesaid, caused Plaintiffs to suffer deprivations of their rights to be free from unlawful searches, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

104. As a direct result of said deprivations, Plaintiffs were caused to suffer severe humiliation, embarrassment, fright, anxiety, mental anguish and emotional distress.

105. The unlawful acts, conduct and actions of Defendant were willful, wanton, intentional, deliberate and committed with reckless disregard for and/or reckless indifference to the said rights of Plaintiffs, thereby entitling Plaintiffs to an award of punitive damages.

106. As a further result of the unlawful acts, conduct and actions of Defendant, Plaintiffs are entitled to an award of reasonable attorney's fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988.

WHEREFORE, Plaintiffs demand judgment against Defendant in excess of $50,000, consisting of compensatory damages, punitive damages, reasonable attorneys' fees, litigation costs, prejudgment interest, and any other such relief that the Court deems just and appropriate.

COUNT V

PLAINTIFFS v. DEFENDANT
FALSE IMPRISONMENT

107. Plaintiffs incorporate by reference the averments contained above as if set forth fully and at length herein.

108. In the course of the illegal stop, Defendant intended to confine Plaintiffs within certain fixed boundaries consisting of the inside of Plaintiffs' vehicle; the vicinity of the back of Plaintiffs' vehicle; and the inside of Defendant's vehicle (collectively, "Imprisoned Locations").

109. Through his conduct during the course of the illegal stop, Defendant caused Plaintiffs to be confined within the Imprisoned Locations.

110. Defendant acted with malice and engaged in willful misconduct when he caused Plaintiffs to be confined within in the Imprisoned Locations.

111. Defendant did not have a reasonable or lawful basis for confining Plaintiffs within the Imprisoned Locations.

112. At all relevant times, Plaintiffs were aware that Defendant was confining them within the Imprisonment Locations.

113. As a direct result of the said unlawful confinement, Plaintiffs were caused to suffer severe humiliation, embarrassment, fright, anxiety, mental anguish and emotional distress.

114. Furthermore, the unlawful acts, conduct and actions of Defendant in causing the said unlawful confinement were willful, wanton, intentional and done with malice, thereby entitling Plaintiffs to an award of punitive damages.

WHEREFORE, Plaintiffs demand judgment against Defendant in excess of $50,000, consisting of compensatory damages, punitive damages, prejudgment interest, and any other such relief that the Court deems just and appropriate.

COUNT VI

PLAINTIFFS v. DEFENDANT
ASSAULT

115. Plaintiffs incorporate by reference the averments contained above as if set forth fully and at length herein.

116. Throughout the course of the stop, Defendant acted with malice towards Plaintiffs and engaged in willful misconduct when he:

a. repeatedly spoke to Plaintiffs with vile profanity;

b. displayed an aggressive tone and manner towards Plaintiffs;

c. told Plaintiffs repeatedly that they were lying;

d. searched Plaintiffs and Plaintiffs' vehicle without probable cause or rational basis;

e. compelled Plaintiffs to submit to an illegal strip search in the back of Defendant's vehicle with the door open so that Plaintiffs were in plain view of members of the public; and

f. abused his authority by acting as aforesaid and in a vicious and irrational manner.

117. The said acts and conduct were committed while Defendant, an armed officer, exercised control and dominance over Plaintiffs.

118. Defendant willfully and maliciously acted as aforesaid to place Plaintiffs in imminent fear and apprehension of physical injury and/or bodily harm.

119. Defendant's said acts of conduct, done willfully and with malice, did cause Plaintiffs to be placed in imminent fear and apprehension of physical injury and/or bodily harm.

120. As a direct result of Defendant's conduct, Plaintiffs were caused to suffer severe humiliation, embarrassment, fright, anxiety, mental anguish and emotional distress.

121. The unlawful acts, conduct and actions of Defendant in causing Plaintiffs to be assaulted were willful, wanton, intentional and done with malice, thereby entitling Plaintiffs to an award of punitive damages.

WHEREFORE, Plaintiffs demand judgment against Defendant in excess of $50,000, consisting of compensatory damages, punitive damages, prejudgment interest, and any other such relief that the Court deems just and appropriate.

COUNT VII

PLAINTIFFS v. DEFENDANT
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

122. Plaintiffs incorporate by reference the averments contained above as if set forth fully and at length herein.

123. Defendant's acts and conduct throughout the course of the stop were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency.

124. As a direct result of Defendant's said acts and conduct, Plaintiffs were caused to suffer severe emotion distress.

125. The unlawful acts, conduct and actions of Defendant were willful, wanton, intentional and done with malice, thereby entitling Plaintiffs to an award of punitive damages.

WHEREFORE, Plaintiffs demand judgment against Defendant in excess of $50,00, consisting of compensatory damages, punitive damages, prejudgment interest, and any other such relief that the Court deems just and appropriate.

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CASEY GREEN
WADE D. ALBERT

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Dated: January 13, 2012

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Wade D. Albert, hereby certify that on January 13, 2012, I caused *Plaintiffs' Amended Complaint* to be served on the following via U.S. Mail:

Sue Ann Unger
Senior Deputy Attorney General
Office of the Attorney General
21 S. 12th Street, 3rd Floor
Philadelphia, PA 19107

Dated: January 13, 2012

Wade D. Albert, Esquire

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