No. 08 – 351

IN THE
Supreme Court of the United States

ANITA ALVAREZ,
State's Attorney of Cook County, Illinois,

Petitioner,

v.

CHERMANE SMITH, EDMANUEL PEREZ,
TYHESHA BRUNSTON, MICHELLE WALDO,
KIRK YUNKER and TONY WILLIAMS,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit**

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Police Accountability Project (NPAP) was founded in 1999 by members of the

National Lawyers Guild, which was the first racially integrated national bar association.[1] NPAP was founded with the intent to end police abuse of authority and to provide support to both grassroots organizations as well as victims' organizations that combat police misconduct. Nationally, there are more than 350 NPAP members. NPAP provides training and support for attorneys and public education on issues relating to police misconduct. Amicus also supplies information and resources for non-profit and community groups who assist victims of police abuse and lends its support to legislative reforms aimed at ensuring police accountability. NPAP oversees and enables a forum for legal professionals and community organizations to meet and creatively work towards ending police misconduct.

One of the most important missions of NPAP is to promote accountability of police officers and their employers for violations of the Constitution or laws of the United States. To that end, Amicus urges affirmance of the Seventh Circuit's decision. As written, the Drug Asset Forfeiture Procedure Act, or DAFPA, gives police officers in the field unfettered

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[1] This amicus brief is filed with the consent of the parties. Petitioner has filed a letter with the Clerk of the Court consenting to the filing of amicus briefs, and respondents' letter of consent is being filed with the Clerk of the Court together with this brief, in accordance with this Court's Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission.

discretion to seize the private property of Illinois citizens without a warrant. Seizures are to be predicated on a probable cause determination by an officer that the vehicle is involved in narcotics activity. The principle constitutional infirmity of DAFPA lies in the length of time that can elapse between the initial seizure and the initiation of forfeiture proceedings. Under DAFPA, depending on the value of the car, owners can face up to 187 days before being granted an audience with a judicial body.

In the interim, there is no one to whom owners can complain; there is no way to challenge the validity of the seizure. Put another way, there is no check on the officer's decision to seize. Without judicial oversight, the officer's decision to seize stands for months or years, regardless of whether the officer properly determined probable cause. Such a statutory scheme is dangerous enough on its own, but the particularly disturbing aspect of DAFPA is that police agencies are partially funded through the seizures they make. Officers have a direct pecuniary interest in the seizure of vehicles, and this conflict of interest, codified by DAFPA, imperils the constitutional rights of Illinois citizens. Police accountability does not manifest itself, and the first – and sometimes last – line of defense against official impunity has always been the courts. Reversing the Seventh Circuit's decision that due process requires a prompt post-seizure hearing to determine the validity of seizures under DAFPA would foreclose meaningful oversight of Illinois police agencies, lead to an increase in unreasonable seizures of private property, and prohibit owners from challenging warrantless seizures. As written, DAFPA is a constitutional

vacuum – a place where cherished liberties languish or perish; so Amicus urges affirmance to fill that void with the due process protections demanded by this Nation's Constitution.

SUMMARY OF ARGUMENT

The Illinois Drug Asset Forfeiture Procedure Act, 725 ILCS 150/1 *et seq.,* (DAFPA) usurps the duty of the courts to be watchful over the security of persons and property. Instead, it gives the determination of probable cause to seize civilians' property entirely to the police officer in the field, and allows that property to be kept away from its owner for up to 187 days before judicial intervention. This Court has never abided unchecked police action. It has instructed that either before the police act or shortly thereafter, a neutral magistrate must examine the operative facts of a seizure – be they of a person or property – to ensure the state has complied with the Constitution. Petitioners would have this Court believe DAFPA contains constitutionally sufficient safeguards for citizens, but such argument ignores both an ongoing history of police misconduct and the Court's repeated conclusions that police officers in the field do not correctly ascertain the existence of probable cause.

It is improper and inadequate for police officers to be entrusted with the sole determination of probable cause. This is both because police officers lack the necessary expertise to make such determinations and because, unfortunately, some officers lie. Certainly, this Court does not entrust prosecutors with the sole determination of probable cause, let alone a beat officer. *Gerstein v. Pugh,* 420

U.S. 103 (1975). Petitioners offer no constitutionally legitimate reason to deviate from the well-reasoned principle that police officers in the field must have judicial oversight for their actions. This is especially true where, as here, the officers possess a pecuniary interest in the seizure of vehicles. Under DAFPA, the seizing agency is allocated up to 65% of the funds generated by the forfeiture. True, both good and bad officers get probable cause wrong, albeit for different reasons. However, Illinois has devised a system where all police officers have an economic incentive to seize vehicles – their budgets depend on it. This financial motivation is another basis to compel an adversary setting in which individuals can challenge the continued seizure of their property.

It falls to this Court to guard the people of Illinois against governmental encroachment of their property because Illinois has precluded adequate citizen challenges to vehicular seizures. There are numerous reasons for this Court to affirm the decision below. After an introduction to the structure of DAFPA illustrating its inherent incentive to falsely seize vehicles, Amicus makes three main arguments. First, police officers cannot be trusted to determine probable cause to seize, because some police officers lie – a fact well documented by state courts, federal courts, independent commissions and academics since this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). Particular emphasis is placed on police officer perjury and false reporting, as these types of misconduct are most apropos of the misconduct incentivized by DAFPA. Second, Amicus focuses on the particular problem posed by DAFPA, namely, officers' financial incentive to contrive probable cause to seize vehicles. Finally, Amicus

argues that the Seventh Circuit's decision below, requiring a due process hearing analogous to that imagined by this Court in *Gerstein*, is the appropriate vehicle to protect the Illinois citizenry from governmental overreaching.

ARGUMENT

I. ILLINOIS' DAFPA: A CODIFIED CONFLICT OF INTEREST

The Seventh Circuit noted that DAFPA itself does not require a post-seizure determination of probable cause. *Smith v. Chicago et al,* 524 F.3d 834, 835 (7th Cir. 2008). The result: for property valued at over $20,000.00, up to 97 days can elapse between the seizing officer's determination and *the filing* of forfeiture proceedings (which do not include an actual hearing), and for vehicles worth less than $20,000.00, as many as 187 days can elapse between seizure and the institution of proceedings against the property (the time can be reduced to 142 days if the claimant acts "swiftly"). *Id.* at 835-836. The delay can be much longer, even more than a year.

It is highly problematic that a vehicle's seizure is based solely on the officer's determination of probable cause and that so much time can elapse before a person can challenge the seizure of their vehicle. Inherent in DAFPA and its enabling statutes is another grave concern compounding the problem: the seizing police agency receives funding from forfeiture proceeds under the Act.

Seizures regulated by DAFPA are affected pursuant to underlying prohibitive drug acts. DAFPA cross-references these various acts regarding

the distribution of profits from the seized property. If the property is seized pursuant to the State's Cannabis Control Act, Controlled Substance Act, or Methamphetamine Control and Community Protection Act, 65% of the proceeds go to the agency responsible for the preceding investigation (*i.e.*, the officer's police department). 720 ILCS 570/505(g)(1)-(3). If property is seized and subsequently forfeited under the Narcotics Profit Forfeiture Act, 50% of proceeds are distributed to the local agency responsible for the underlying investigation. 725 ILCS 175/5(g)(1)-(3).

Under DAFPA, the time limits, lack of meaningful oversight, and inherent incentives are crucial factors for this Court's constitutional review. DAFPA is a law with no meaningful opportunity to challenge the warrantless seizure of private property for six plus months, a law that allows a police officer's determination of probable cause to stand for that same six plus months, a law that ignores innocent vehicle owners, and a law that rewards police agencies financially the more vehicles they seize. With these considerations in mind, Amicus turns now to the ongoing history of police misconduct to evidence the constitutional infirmities of DAFPA.

II. POLICE OFFICER MISCONDUCT IS WELL DOCUMENTED AND CANNOT BE IGNORED WHEN EXAMINING DAFPA

The Court has long recognized that (some) police officers lie or, at a minimum, cannot be trusted to get constitutional law right. For example, in *Mapp*, this Court intuited that the officers fabricated the existence of the search warrant given that no

warrant was produced at the underlying criminal trial – a peculiar absence that was not accounted for by prosecutors. *Mapp*, 367 U.S. at 645. Since *Mapp*, courts, writers, academics, and commissions have documented that police officers make various efforts to ensure evidence will be admissible – regardless, at times, of the legality of their actions. The reasons underlying such official misconduct are as voluminous as the sources that document it. Amicus intends to show the Court that police officers are not reliable sources of probable cause determinations. The synopsis that follows is a representative portion of documented misconduct in its various forms since *Mapp*.

A. CALLING THINGS BY THEIR RIGHT NAME: THE GENESIS OF TESTILYING AND ITS PROGENY

Although not the first of its kind, perhaps the best-known commission to investigate allegations of widespread police misconduct convened in New York City in the mid-1990s. Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep't, City of New York (1994) (Milton Mollen, Chair) [hereinafter cited as Mollen Commission]. A principal finding of the Mollen Commission was that false reporting, courtroom perjury, and documentary perjury (*e.g.,* warrant affidavits) were the most common forms of police corruption in the criminal justice system. Mollen Commission at 36. In fact, the problem was so rampant in certain New York City precincts that officers created a word for lying under oath: testilying. *Id.* Common examples of testilying

included claiming a traffic violation to justify stopping a motorist, claiming to see a bulge indicative of contraband on a person, claiming to see money exchange hands, claiming to see drugs in plain view, and inventing unidentified civilian informants. *Id.* at 38. Pointedly, in each example, police were in pursuit of drugs, guns, or both, *id.*, just as the seizures under DAFPA are related to drug arrests.

Scholars offer a variety of reasons for the existence of testilying. Some argue that police, though rarely, commit perjury to frame the innocent or, more commonly, to protect fellow officers' misconduct from being discovered – a phenomenon commonly referred to as the "code of silence" or the "blue wall of silence." G. Chin & S. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U.Pitt.L.Rev. 233, 237 (1998) [hereinafter cited as Chin & Wells, *Blue Wall of Silence*]. Some postulate officers testilie to cover up their own misconduct, such as when evidence is planted, and to ensure that the presumed guilty do not go free. C. Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U.Colo.L.Rev. 1037, 1038 (1996) [hereinafter cited as Slobogin, *Testilying*]. Put differently, police lie to avoid *Mapp*'s application in order to convict those the officers believe to be guilty. *Id.* at 1040. Studies show that police perjury is most common in drug cases, M. Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1312 (1994) [hereinafter cited as Cloud, *Dirty Little Secret*], during the investigative and pretrial stages of a case, Slobogin, *Testilying* at 1042, specifically in suppression hearings. Chin & Wells, *Blue Wall of Silence* at 248. This is done to

"constitutionalize" a case or to insulate evidence from exclusion. Slobogin, *Testilying* at 1045.

In Chicago, constitutionalizing a case is called "shading." Chicago Appleseed Fund for Justice, Criminal Justice Project, *A Report on Chicago's Felony Courts*, 76 (December 2007) [hereinafter cited as Appleseed Project]. The Appleseed Project interviewed defense attorneys, prosecutors, and judges at Chicago's primary criminal courthouse and found that all public defenders (24), two-fifths of prosecutors (12 of 27), and most judges (20 of 27) believed police perjury occurs. *Id.* at n. 115. Shading one's testimony ranged from the seemingly innocuous – altering an arrestee's height or weight in a police report – to substantive matters – claiming offenders admitted possessing drugs. *Id.* Perhaps the two most disturbing aspects of testilying are that these lies are frequently outcome-determinative, and that it is almost impossible for anyone to discern which officer is being honest and which is not. Cloud, *Dirty Little Secret* at 1311, Appleseed Project at 77.

In the years following *Mapp,* courts were confronted with allegations of police perjury, commonly in the form of "dropsy" testimony. For example, in the case *Bush v. United States*, two men faced narcotics charges and the evidence against them was predicated on the testimony of one undercover officer. 375 F.2d 602, 603 (D.C. App. 1967). Following their convictions, the defendants appealed, seeking a rule that juries be instructed that narcotics officers' uncorroborated testimony must be viewed with suspicion and used with caution. *Id*. at 604. Soon-to-be Chief Justice Burger rejected appellants' arguments, finding "it would be a dismal reflection on society to say that when the

guardians of its security are called on to testify in court under oath, their testimony must be viewed with suspicion. This would be tantamount to saying that police officers are inherently untrustworthy." *Id.*

In contrast, one judge all too familiar with dropsy testimony examined the problem of testilying nearly 25 years before the Mollen Commission gave it a name. Judge Irving Younger confronted dropsy testimony head-on when an officer testified at a suppression hearing that upon seeing said officer, Defendant McMurty dropped a small plastic container, which, when recovered, proved to be marijuana. *New York v. McMurty*, 314 N.Y.S. 2d 194, 195 (Crim.Ct. N.Y. 1970). This was standard ilk as far as Judge Younger was concerned. The defendant did not deny that he had marijuana; rather, he knew "after twelve years of involvement with drugs and four or five prior convictions, that illegal-search-and-seizure was [his] only defense." *Id.* Armed with this "knowledge," McMurty testified the last thing he would do was drop his marijuana; instead he had hoped the officer would search him without cause, which is precisely what he alleged occurred. *Id.*

Judge Younger found extraordinary that police gave dropsy testimony in "hundreds, perhaps thousands" of cases every year. *Id.* at 195-196. Quoting himself, it was apparent to the Judge that police committed perjury in some cases or, perhaps, in nearly all of them. *Id.* at 196, quoting I. Younger, *The Perjury Routine*, The Nation (May 8, 1967). Judge Younger remembered that in the months after *Mapp,* officers continued to tell the truth in court, resulting in suppression, until the officers realized that drugs dropped on the ground in plain view

would survive suppression motions. *Id.* Believing that dropsy testimony should be scrutinized with caution, Judge Younger disagreed with then-Judge Burger's language in *Bush*: "When there are grounds for believing that the guardians of its security sometimes give deliberately false testimony, it is no dismal reflection on society for Judges to acknowledge what all can see. If courage is the secret of liberty, the first task of free men is to call things by their right name." *Id*. at 197 (internal citations and quotations omitted). Although he desired to place the burden of admissibility on the prosecution, Judge Younger, bound by precedent, denied McMurty's motion to suppress. *Id*. at 198.

In 1975, one court faced the dilemma of what process must occur upon a showing that a warrant affidavit contained perjurious statements. *United States v. Petillo*, 400 F.Supp. 1152 (D.C.N.J. 1975). Petitioners claimed they were denied due process when they were denied a full and fair opportunity to demonstrate that the issuing magistrate had been deceived. *Id.* at 1156. The affiant officer had procured the warrants through information from a "reliable informant." *Id.* at 1158. Arguing that material portions of the affidavit could be proven false, Petillo proceeded to show through testimony that the officer was lying. *Id*. at 1158-1160. The trial court denied the motion to suppress, not because there was insufficient indicia of perjury, but because it agreed with the prosecution that state law prohibited attacking the truth of an affidavit. *Id*. at 1164.

The District Court of New Jersey found the ruling could not survive constitutional scrutiny. *Id*. at 1165. The court concluded that due process

required, after a preliminary showing of misrepresentations in warrant applications that the defendant be allowed to attack the veracity of police affidavits, not just for the defendant, "but to protect the courts themselves from becoming unwitting and unwilling accomplices in the willful disobedience of a Constitution. *Id.* at 1177, quoting *Elkins v. United States*, 364 U.S. 206, 223 (1960) (internal quotations omitted). Three years later, *Franks v. Delaware* was decided. 438 U.S. 154 (1978) (holding if a defendant shows an affidavit contains false statements, the Fourth Amendment requires an opportunity to challenge the truthfulness of statements therein, and if perjury is shown by a preponderance of the evidence and probable cause is lacking without the perjury, the evidence must be suppressed).

In a case following *Franks*, an officer lied in a warrant affidavit, listing one "John" as an informant who indicated drugs were being dealt out of an apartment. *Commonwealth v. Lewin*, 405 Mass. 566, 566-567 (1989). An officer was killed in the execution of the warrant. *Id.* at 568. Defense counsel unearthed that John was used by the same officer to secure 31 warrants in less than one year. *Id.* at 571. Ordered several times by the judge to produce John, who, if he existed, would have potentially exculpatory information, several officers went about the task – filing reports and testifying that John was still being sought. *Id.* When John was not produced, the indictments were dismissed by the trial judge, who found the officers' and prosecution's conduct deliberate and egregious. *Id.* at 574. Under order of the court to explain themselves via affidavits, the officers admitted their perjury. *Id.* at 576. On appeal, the court determined John did not exist. *Id.*

at 582. Noting the defense had easily met its burden under *Franks*, the court described the officers' conduct as reprehensible, egregious, knowing, and a blatant violation of their sworn duties that deserved censure, condemnation, and punishment. *Id*. at 585-586.

B. MODERNITY'S DOCUMENTATION AND CONCEPTION OF TESTILYING

In a recent federal drug case, a court granted a motion to suppress due to incredible testimony by officers. *United States v. Matos*, 07-CR-870 (NGG), 1 (E.D.N.Y. Sept. 23, 2008). A fugitive task force, consisting of U.S. Marshals and New York City police, arrested the cousin of the man they sought. *Id*. at 2. According to the officers' testimony, the following events unfolded: Matos, while balancing his cell phone on his shoulder, reached into his pocket and dropped two bags containing cocaine in plain view of the officers. *Id*. at 2-3. Once inside his apartment, Matos spontaneously blurted out that drugs were present. *Id*. at 3-4. Matos' account differed significantly, including how the officers approached (guns drawn, yelling profanities) and whether he dropped anything, consented to the search of his apartment, or indicated the presence of drugs (he did not). *Id.* at 5-6.

The government argued there was probable cause to arrest Matos based on the dropsy testimony of the officers. *Id.* at 8. The court found "the officers' chronicle of events to be a complete fabrication. Each step of the officers' story defies credibility." *Id*. at 9. Later, the court granted the government's motion to re-open the suppression hearing, not because the

court believed its conclusions that the officers' testimony "was not credible and possibly perjurious" was incorrect, but because the government should be granted an opportunity to prove those conclusions wrong. *United States v. Matos,* 2008 WL 5169112 (E.D.N.Y Dec. 8, 2008).

In a "disturbing" case of government misconduct, an officer testified that he knew Darwin Jones and saw him pedal away on a bicycle, which was suspicious, as Jones had never avoided the officer before. *United States v. Jones*, 2009 U.S. Dist. LEXIS 6434, *1-2 (D. Mass. 2009) (unpublished). What made this testimony "false" were the officer's statements to the prosecutor – in three separate interviews – that he did not recognize Jones. *Id.* at *4-8. That such exculpatory evidence was not disclosed raised the ire of the court. The officer was discredited due to his contradictory statements to the prosecution, inconsistencies in his police reports, and a finding that he had testified untruthfully in another case. *Id.* at*21-23. The court similarly discredited the testimony of the two other officers, as each had testified untruthfully in another criminal prosecution. *Id*. at *25 n. 6. Ultimately, the court ruled due process had not been offended because the inconsistent statements were produced prior to the suppression hearing, *Id*. at *3. Notably, to prove what it described as an egregious failure to disclose exculpatory evidence in Jones' case, as well as "a dismal history of intentional and inadvertent violations," *id*. at *13, the court attached eight examples of misconduct to its ruling, which included prosecutors and/or officers intentionally withholding exculpatory evidence, disobeying court orders, failing to disclose documents and impeaching evidence,

making misrepresentations, and belatedly disclosing exculpatory information. *Id*. at *50-53.

Numerous courts have found testilying to be a serious problem. Although they approach the problem differently, increasingly jurists call the phenomenon by its right name: perjury. Such lies have the capacity to deprive a person of their liberty and, under statutory schemes such as DAFPA, their property. What is clear at this point is that some police officers will lie. They lie to avoid *Mapp*'s application. They lie to cover up for their misconduct. They lie to cover up their fellow officers' misconduct. They lie to ensure the conviction of those the officers have decided are guilty. Some of these motives to lie are less opprobrious than others; in at least some cases, the officers' motives are to achieve a form of "justice." For all of these reasons, it is the courts that are better equipped to decide constitutional questions. Police officers should be left to do police work. Judges should make probable cause and other determinations to uphold the Constitution.

"There comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana,* 338 U.S. 49, 52 (1949) (Frankfurter, J.). Police brutality and corruption exist, but this Court need not swallow the large pill that all officers lie to acknowledge this (*i.e.,* to call things by their right name). In 1994, law enforcement officials told the Mollen Commission that police perjury had lead to a rise in acquittals, because "juries increasingly suspect and reject police testimony." Mollen Commission at 39. One year later a New York prosecutor had this to say about the impact of police perjury exposed in the O.J. Simpson

case: "Our prosecutors now have to begin their cases defending the cops. Prosecutors have to bring the jury around to the opinion that cops aren't lying. That's how much the landscape has changed." J. Sexton, *Jurors Question Honesty of Police*, N.Y. Times, Sept. 25, 1995 (quoting Michael F. Vecchione), available at nytimes.com/1995/09/25/nyregion/jurors-question-honesty-of-police.html. Thus, the common belief in some communities is, "whether you stand still or move, drive above, below or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you." *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J.). Officers' unreviewed probable cause determinations under DAFPA are suspect, because "such subjective, promiscuous appeals to an ineffable intuition should not be credited." *Id.*

C. CHICAGO: A CASE STUDY

Chicago, a city known for governmental corruption, is rife with examples of police misconduct. The press is overrun with stories such as a Chicago police officer convicted of beating a female bartender, or seven officers in an elite unit being federally charged with robbery and kidnapping. R. Hussain, *Suspended Chicago Cop Anthony Abbate Convicted of Beating Female Bartender*, Chi. Sun Times, June 2, 2009, available at suntimes.com/news/24-7/1603349,cop-anthony-abbate-verdict060209.article; National Public Radio, *Scandals Bring Down Chicago's Elite Policing Unit*, October 10, 2007, available at npr.org/templates/story/story.php?storyId=15149792.

The public learns an officer has been sentenced to 40 months in prison for beating a man that was handcuffed to his wheelchair. N. Korecki and T. Fardon, *Former Chicago Cop William Cozzi Sentenced to 40 Months*, Chi. Sun Times, June 12, 2009, available at suntimes.com/news/metro/1618841,william-cozz-sentence-video-beating-061109.article. Chicagoans see articles showing what citizens can expect if they help an injured police officer – 10 months in jail. M. Garcia and D. Heinzmann, *Chicago and Police Officers Lose Case and $7.7 million for False Arrest*, Chi. Trib., June 12, 2008, available at archives.chicagotribune.com/2008/jun/12/local/chi-federal_jury_verdictjun13. They learn, not only that a veteran Chicago officer has been convicted of raping a woman while on duty, but that the judge who heard the case described two officers' testimony as "nothing short of perjury." K. Ataiyero, *Officer Found Guilty of Rape: Judge Criticizes Court Testimony of 2 Detectives*, Chi. Trib., Dec. 11, 2007, available at archives.chicagotribune.com/2007/dec/11/news/chi-herman11dec11. Residents of Chicago learn the City must pay four million dollars to a man who two officers sodomized with a screwdriver. J. Coen, *2 Officers Held Liable in Assault: Man Stands to Get $4 Million from City*, Chi. Trib. Oct. 17, 2007, available at archives.chicagotribune.com/2007/oct/17/news/chi-screwdriver_alloct17. And Chicagoans are all too familiar with allegations that police tortured suspects to induce confessions, which has resulted in the indictment of the alleged ringleader of the torture for perjury in a civil suit. S. Mills and J. Coen, *Feds Catch Up with Burge: Notorious Ex-Chicago*

Commander Charged with Lying About Torture, Chi. Trib., Oct. 22, 2008, available at chicagotribune.com/news/local/chi-burge-22-oct22,0,6553487.story. While sentencing a Chicago police officer to almost 11 years in prison for robbery, Judge Gettleman of the Northern District Court of Illinois, summed up the feelings of many when he said, "In this city, it seems to me we are bombarded by stories and cases and prosecutions of police misconduct….It's been accelerating…It's very discouraging." N. Korecki, *Judge: I'm Tired of Crooked Cops in Chicago*, Chi. Sun Times, June 30, 2009, available at suntimes.com/news/metro/1645499,badcop-chicago-063009.article.

Recently, widespread, traffic stop-related misconduct by Chicago police officers has been alleged. Officer misconduct, including perjury and false reporting, has lead to several dozen criminal cases being dismissed and has exposed the City to considerable civil liability. Chicago police officer John Haleas, honored for writing the most DUI citations in the State of Illinois, had two prosecutors ride along with him on patrol one night in 2005. During Haleas' DUI arrest that night, these prosecutors documented blatant violations of departmental policies, causing them to complain to internal affairs, which in turn sustained several allegations of misconduct. Fifty DUI prosecutions involving Haleas were dropped and the state's attorneys office acknowledged perhaps as many as 500 cases were in jeopardy of dismissal. B. Bradley, *50 DUI Cases Dropped Over Cop's Improper Procedure*, ABC News 7 Chicago, Oct. 24, 2007, available at

abclocal.go.com/wls/story?section=news/local&id=572389. The fallout from Haleas' actions included the filing of at least eight federal civil rights lawsuits, some involving multiple plaintiffs.

Another Chicago officer, Richard Fiorito, also honored for substantial DUI arrests, was alleged to have targeted gay men and women for stops and then falsely arresting them for DUI and traffic violations. Prosecutors dismissed two of Fiorito's cases and a judge dismissed a third. N. Ahmedullah, *Lawsuits Accuse Chicago Police Officer Richard Fiorito of False DUI Arrests, Harassing Gays*, Chi. Trib., April 3, 2009, available at archives.chicagotribune.com/2009/apr/03/local/chi-cop-gay-protestapr03. Fiorito and the City of Chicago have been sued more than ten times for the conduct alleged above.

It only takes one so-called bad apple. In the context of DAFPA, one officer with nefarious intent can deprive countless vehicle owners of their property and he can do this for more than six months without judicial oversight. In the interim, the owners are often without reliable means to transport themselves and their families. Sadly, the reality in Chicago is that there is far more than one bad apple. Chicago's Police Superintendent went so far as to be held in contempt of court (for refusing to produce a list of officers with repeated complaints) to prevent the public from learning how many bad apples existed under his command. K. Hawkins, *Top Cop Jody Weis Found in Contempt of Court Over Reported Cops List*, The Huffington Post, March 4, 2009, available at http://www.huffingtonpost.com/2009/03/04/top-cop-jody-weis-found-i_n_171937.html. The list would

have included officers with up to 65 citizen complaints in the last five years and about 2,500 officers with six or more complaints. *Id*. In a city with a police force exceeding 13,000 members, how many bad apples constitute a "few"? Illinois citizens need their rights protected, be it from hundreds of officers or one.

III. INCENTIVIZING MISCONDUCT: THE PECULIAR AND PARTICULAR PROBLEMS OF CIVIL FORFEITURE

Thus far, Amicus has presented evidence that police perjury and misconduct exist. DAFPA is particularly dangerous in that it is predicated on trusting an officer to properly assess probable cause when seizing citizens' property – a determination that can divest an owner of their vehicle for more than 187 days without judicial review. The Seventh Circuit believed such a statutory scheme implicated due process and took steps to mitigate the risk of erroneous deprivations. The lower court believed due process required a probable cause determination even without emphasizing the most suspect aspect of DAFPA: that depending on the value of the vehicle seized, owners wait 97-187 days just for the forfeiture action to be filed and that, should the property be forfeited, the seizing agency reaps 50-65% of the profits.

The federal government and nearly every state have a drug asset forfeiture statute, the majority of which use money from seized property to fund law enforcement. See E. Blummenson & E. Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U.Chi.L.Rev. 35 (1998) [hereinafter cited

as Blummenson & Nilsen, *Policing for Profit*]. Illinois police agencies have a direct and real financial incentive to pursue forfeitures, as 50-65% of all profits from forfeitures are returned to that agency. DAFPA codified a conflict of interest between officers' sworn duty to uphold the law, while simultaneously offering "a possible temptation to the average man as a [police officer]…not to hold the balance nice, clear and true." Blummenson & Nilsen, *Policing for Profit* at 57 quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a conflict of interest has been held to violate due process. *Tumey*, 273 U.S. at 532 (mayor who also acted as judge in proceedings in which he had a pecuniary interest violated due process). Under DAFPA, for months, a police officer acts as both prosecutor and judge, determining if a vehicle is associated with narcotics activities, whether to seize the vehicle, and if it will be held for later proceedings. All the while the officer knows that if the property is forfeited, half to two-thirds of any monies made will return to her department. For departments facing budget problems, officers and their superiors may see forfeiture as the means to supplement their shortfall, encouraging police to chase profitable law enforcement goals rather than legitimate ones. Blummenson & Nilsen, *Policing for Profit* at 56. As argued in Section II, *infra*, some police will lie, under oath, to escape suppression under *Mapp* or to conceal their misconduct. Add to that a pecuniary interest in making particular arrests and seizures, and the law begets lawlessness. This is not merely a possibility; the effects of officers' pecuniary interest in law enforcement can already be seen in the following examples.

Several Oakland Housing Authority (OHA) officers were convicted in federal court for civil rights violations and appealed their convictions. *United States v. Reese*, 2 F.3d 870, 873 (9th Cir. 1993). Aware that the federal grant that funded their special task force was limited to 18-24 months, these officers, who took "anything and everything" they saw like a "wolf pack," were often reminded to keep their arrest numbers up in order to secure another grant. *Id*. at 874. The commanding officer told his officers it was permissible to steal money from drug dealers because they had no one to which to complain. The supervisor began shifts with motivational quips like: "Let's go out and kick ass…Everybody goes to jail tonight for everything, all right?" *Id*. The officers followed these directives, and the Ninth Circuit documented egregious instances of excessive force (*e.g.*, striking suspects in the head with flashlights, performing rectal searches on the street), false arrests, failing to prevent injuries to arrestees, stealing, false reporting (including dropsy arrests), and perjury that went on for months. *Id*. at 874-880. The court upheld the appellants' convictions. *Id*. at 897. These officers were motivated – at least in part – by financial incentives: ensuring the money that funded their task force was renewed.

In 1992, a task force comprised of officers from numerous state and federal agencies was created following information from a confidential informant that Donald Scott, a wealthy 61-year-old, was growing substantial amounts of marijuana on his property. Blummenson & Nilsen, *Policing for Profit* at 73. Although the informant's claims were not corroborated, thirty task force members raided

Scott's home; responding to his wife's screams, Scott armed himself and was shot dead in front of his wife. *Id.* at 74. No drugs were found on Scott's property and a district attorney's investigation uncovered disturbing facts: there was no evidence that marijuana was being grown on Scott's property, much of the information contained in the supporting affidavit was false, and exculpatory information was withheld from the issuing magistrate. *Id.* More to the point, the district attorney's investigation showed that the goal of the raid was to obtain the proceeds from Scott's five-million-dollar home once it was forfeited. *Id.* at 74-75. Before the raid, officers were given appraisals of Scott's land. *Id.*

Regardless if the motivation is federal funding (*Reese*) or forfeiture of high-value property (Donald Scott), it is clear that officers' pecuniary bias can cause selective and abusive policing and a practice of targeting assets instead of criminals. *Id.* at 77. The Court recognizes that certain conflicts of interest, akin to that codified in DAFPA, violate due process. *Tumey*, 273 U.S. 510. The Constitution cannot tolerate a statute where an officer's determination of probable cause constitutes all the process that is due owners of seized property, especially when this determination can hold without judicial review for more than six months. As a result, the question remains how to test these due process considerations. Amicus argues *Mathews* provides the flexibility and protection required under the circumstances.

IV. DUE PROCESS AND DAFPA

Under DAFPA, officers are the only process due to persons whose cars are seized - police officers

alone determine the rights of aggrieved individuals under the Act, and as this Court recognizes, "the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal.'" *Bracy v. Gramley,* 520 U.S. 899, 904-905 (1997), quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). This procedural floor guarantees "a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy*, 520 U.S. at 905, citing *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821-822 (1986); *Tumey*, 273 U.S. at 523.

As written, DAFPA does not comport with the minimum requirements of due process. Finding the statutory scheme to be constitutionally repugnant, the Seventh Circuit introduced a prophylactic, adversarial hearing to the same purpose this Court has continuously served: to protect the citizenry from governmental overreaching.

Lower courts have voiced concerns about forfeiture in other instances. *United States v. That Certain Real Property Located at 632636 Ninth Avenue, Calera, Alabama*, 798 F.Supp. 1540, 1551 (N.D. Ala. 1992) (discussing frustration with governmental overreaching in forfeiture cases, whose funding mechanism creates a "built-in conflict of interest" for law enforcement agencies). Members of this Court have voiced similar concerns. *Bennis v. Michigan,* 516 U.S. 442, 456 (1996) (Thomas, J., concurring: if used improperly "forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.").

Permeating this Court's jurisprudence is a healthy realism about the constitutional bounds in which police may act. For example, where a confidential informant provides the basis for probable cause in a warrant affidavit, the affiant officer must provide the issuing magistrate with sufficient indicia of veracity and credibility, given the totality of the circumstances, to justify the warrant. *Illinois v. Gates*, 462 U.S. 213 (1983).

This constitutionally required skepticism exists before the arrest, as in *Gates*, and continues after the arrest. For example, where a criminal defendant preliminarily shows a warrant was obtained through false statements, the Constitution mandates that defendant be given an opportunity to challenge the statements made in the affidavit, and, if he does so by a preponderance of the evidence and probable cause is lacking as a result, the evidence obtained thereon must be suppressed. *Franks*, 438 U.S. 154. Likewise, if a person is arrested without a warrant and is charged via an information, the Fourth Amendment demands a timely determination of probable cause to continue pretrial restraint by a neutral magistrate. *Gerstein*, 420 U.S. 103 (1975).

Where property is concerned, this Court has also been skeptical of non-judicially ordered deprivations. Upholding a "constitutional accommodation," this Court allowed deprivation of property by a creditor under a writ of sequestration, even with no notice to the debtor. *Mitchell v. T. Grant Co.,* 416 U.S. 600, 609-610 (1974). However, this was held permissible only where procedural safeguards existed – writ allowed only after a judge reviewed a verified affidavit, sufficient bond posted, damages provision for wrongful sequestration, and

provision for immediate hearing following the seizure (*i.e.,* a post-seizure probable cause hearing). *Id*. at 616-618. If seizure can "drive a wage-earning family to the wall" or be abused by creditors, notice and a prior hearing are required. *Sniaddach v. Family Finance Corp.,* 395 U.S. 337, 341-342 (1969) (regarding wage garnishment). So too for the federal government to seize real property in a civil forfeiture action, the Fifth Amendment requires prior notice to the owner as well as a hearing, absent exigent circumstances. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Inherent in these cases is the recognition that Fourth Amendment and due process protections run "almost into each other." See *Mapp*, 367 U.S. at 646, quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886). These opinions recall the cherished maxim that physical invasion by the government is a particularly serious intrusion affecting one's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Telepromter Manhattan CATV Corp.* 458 U.S. 419, 433 (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Although there is no doubt the protections of the Fourth Amendment apply in civil and criminal contexts, *Good*, 510 U.S. at 68-69 (Rehnquist, Ch. J., concurring in part and dissenting in part), citing *Soldal v. Cook County*, 506 U.S. 56, 67 (1992), resolution of this matter likely depends on this unanswered question: whether there is a constitutional distinction between real and personal property under the Fourteenth Amendment in forfeiture actions. *Good*, 510 U.S. at 76 (O'Connor,

J., concurring in part and dissenting in part) (finding no distinction).

A. *MATHEWS* IS THE PROPER TEST FOR DAFPA

This Court and the Seventh Circuit understand that because personal property is easily moved, concealed, or destroyed, the government's concerns make pre-seizure notice and hearings not always feasible. *Smith*, 524 F.3d at 836, citing *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). Acknowledging that a post-seizure hearing was still required by due process, the court below appropriately focused on timing as the issue. *Id*. Amicus argues Justice O'Connor was right to discern no constitutional distinction between real and personal property as to whether process is due; the distinction lies in what that process should be, in that real property owners are entitled to pre-seizure notice and hearing, *Good*, 510 U.S. 43. Furthermore, pre-seizure hearing and notice is the rule; lack thereof is the exception, tolerated only in extraordinary situations. *Id*. at 53, quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Given that the Court in *Mathews* dealt with the government's desire to continue holding citizens' property pending a final judgment (see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)), both the Second and Seventh Circuits relied on *Mathews* to accord due process to persons facing forfeiture. *Smith,* 524 F.3d 834; *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

A balancing test, *Mathews* requires courts to consider these factors: the private interest affected by governmental action, the risk of erroneous deprivations of property, the probable value of additional protections, and the burden on the government of additional procedural requirements.

Mathews, 424 U.S. at 335. The court below relied heavily on the Second Circuit's analysis in *Krimstock*, a situation in which seized vehicles could be held for "months or even years" before forfeiture proceedings were complete. *Krimstock*, 306 F.3d at 44. Also, the New York City code at issue in *Krimstock* afforded owners no opportunity for a prompt post-seizure hearing to test for probable cause. *Id.* at 45. Likewise, the *Krimstock* court had to determine what process is due a person whose vehicle is seized by an officer without a warrant. *Id.* at 48.

As Amicus has argued, "some risk of erroneous seizure exists in all cases," and the *Krimstock* court's concerns were "heightened by the fact that the seizing authority in this case has a direct pecuniary interest in the outcome of the procedure." *Id.* at 50-51, citing *Property Clerk v. Hyne*, 147 Misc. 2d 774, 780 (Sup. Ct. N.Y. Co. 1990) (internal quotations omitted). Also of great concern in *Krimstock* was the large time gap between the seizure and the ultimate ruling on forfeiture, a constitutional black-hole where the city, for a significant period, was not held responsible for the legality of the seizure. *Id.* at 54. The Second Circuit also focused on the plight of innocent owners, persons who owned the vehicles but were not driving at the time of the seizures. *Id.* at 56. Thus, the scope of police power to seize, coupled with officers' pecuniary interest in forfeiture, convinced the court to provide a prompt opportunity for a neutral magistrate's review of the validity of continued detention. *Id.* at 57.

Turning to the *Mathews* test, the court found motor vehicles to be of particular importance for transportation and to earn a livelihood. *Id.* at 61. So too did the Seventh Circuit state that today's society

is highly dependent on the automobile, the seizure of which can result in missed doctor's appointments, missed school, or loss of one's job. *Smith*, 524 F.3d at 838. Given that this Court has confronted cases where a vehicle is a person's home, *Soldal*, 506 U.S. 56, it is not hyperbolic to suggest that loss of one's vehicle could drive a family to the wall. See *Sniaddach,* 395 U.S. 337. Hence, the first *Mathews* factor, the private interest involved, weighs heavily in favor of Respondents.

The *Krimstock* and *Smith* courts thoroughly considered the plight of the innocent owner and balanced those interests against the government's. The Second Circuit found "neither the arresting officer's unreviewed probable cause determination nor a court's ruling in the distant future" adequately protected citizens from erroneous deprivations. *Krimstock*, 306 F.3d at 62. The court expressed additional concern where an erroneous deprivation is not cured by ultimately prevailing in court; an owner cannot recover lost use of a vehicle or the depreciation it suffers while sitting idle in impoundment, thus favoring Respondents on the second *Mathews* factor. *Id.* at 64.

The *Smith* and *Krimstock* courts recognized the cities' interests in ensuring that vehicles subject to forfeiture proceedings were not sold or destroyed prior to final ruling. *Smith*, 524 F.3d at 838; *Krimstock*, 306 F.3d at 63. However, the Seventh Circuit, sympathetic to the reality that a probable cause hearing would create some burden on the City, appropriately pointed out that this administrative burden is a necessary price of ensuring due process of law. *Smith*, 524 F.3d at 838. Whereas, the court in *Krimstock* took the view that since the owners (as

here) only sought to challenge continued retention, the city had other means of restraint beyond actual possession, such as bonds or a restraining order prohibiting sale or destruction. *Krimstock*, 306 F.3d at 64-65.

On balance, the Seventh Circuit, like the Second Circuit before it, found that *Mathews* required a prompt post-seizure hearing to determine the validity of continued detention of owners' vehicles. Neither court was persuaded by the government's arguments that *Mathews* was the incorrect test. The *Krimstock* opinion (referring to the *Smith* court's discussion) distinguished the cases relied upon by Petitioners. The cited cases, *United States v. $8,850*, 461 U.S. 555 (1983) and *United States v. Von Neumann*, 474 U.S. 242 (1986), are factually and legally dissimilar from the case before the Court. The former deals only with the speed in which the forfeiture proceeding begins, not whether there should be a hearing to test the detention in the first place, while *Von Neumann* is distinguishable because it does not involve civil forfeiture, but rather, customs laws. *Smith*, 524 F.3d at 837. Furthermore, the delay in *Von Neumann* was approximately one month, the vehicle was released in a matter of weeks after posting bond, and, most significantly, there was a procedure to obtain the speedy release of the vehicle prior to the forfeiture hearing. *Id*. In short, Von Neumann had the exact protection the Respondents seek.

B. *GERSTEIN* IS THE PROPER ANALOGY

Finally, the Seventh Circuit did not supplant the forfeiture proceeding itself; rather, it envisioned a

flexible, "perhaps rather informal," hearing with notice to the owner to allow a showing that the property should be released. *Id*. at 838. There has been no suggestion the hearing should be a lengthy, exhaustive duplication of the forfeiture proceeding, but it should "protect the rights of both an innocent owner and anyone else who has been deprived of property and…to see whether a bond or an order can be fashioned to allow the legitimate use of the property while the forfeiture proceeding is pending." *Id*. at 838-839. To analogize, what the Seventh Circuit required is akin to a *Gerstein* hearing. Although rooted in criminal law, the reasoning in *Gerstein* is equally persuasive here.

The issue in *Gerstein* was whether a person arrested and held for trial by a prosecutor's information was guaranteed a judicial determination of probable cause to justify continued pretrial detention. *Gerstein*, 420 U.S. at 63. This Court noted its longstanding requirement that existence of probable cause must be decided by a neutral and detached magistrate "whenever possible," because "the point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences… Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id*. at 64, quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

The reasoning in the *Gerstein* Court was primarily a balancing – what it described as a practical compromise. While the policeman's assessment of probable cause justified the arrest and

brief period thereafter for administrative processing, after custody the reasons not to include a magistrate "evaporate," as there is no danger the suspect can escape or commit more crimes. *Id.* at 65. And while the government's reasons for taking action subsided, the individual's need for a neutral determination increased, because the consequences of prolonged detention of the person, like Respondents' vehicles here, "may imperil the suspect's job, interrupt his source of income, and impair family relationships." *Id.* A neutral magistrate's detached judgment was essential when the stakes were so high. *Id.* The Court rejected the argument that a prosecutor's decision to file an information sufficiently determined probable cause, since the prosecutor's law enforcement role was constitutionally distinct from the role filled by neutral judges. *Id.* at 67. As here, the *Gerstein* Court did not envision a "fine resolution" of conflicting evidence, but required only that criminal suspects be given a fair and reliable determination of probable cause to justify pretrial restraint, which must be done by a judge before or promptly after arrest. *Id.* at 69 and 71-72.

The *Gerstein* Court guaranteed that which Respondents seek:

> "A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has

> therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic."

Id. at 68, quoting *McNabb v. United States*, 318 U.S. 332, 343 (1943). The Seventh Circuit did not mandate two full evidentiary hearings – it granted only an audience with a detached and neutral magistrate to determine the continued validity of the warrantless seizures of private property. As in *Gerstein*, the stakes are high, but unlike in *Gerstein*, disinterestedness in law enforcement is lacking under DAFPA. Given the phenomena of police officers' testilying and the fact that police officers are not capable judges of probable cause, due process demands an opportunity for citizens to protect themselves from unwarranted invasions of their property, especially when the seizing officers have a direct pecuniary stake in the seizure. The judgment of the Seventh Circuit should be affirmed.

CONCLUSION

The court of appeals' decision should be affirmed.

Respectfully submitted,

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