

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT DEPARTMENT  
TRIAL COURT OF THE COMMONWEALTH  
CIVIL ACTION NO. 2076CV00007

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COMMONWEALTH OF )  
MASSACHUSETTS BERKSHIRE )  
COUNTY DISTRICT ATTORNEY’S )  
OFFICE, )  
) )  
Plaintiff, )  
) )  
v. )  
) )  
ONE 2011 INFINITI G37, Vin )  
#JN1CV6EL9BM262313 and SEVENTY- )  
NINE HUNDRED FIVE HUNDRED )  
THIRTY-FOUR DOLLARS AND SIXTY- )  
SEVEN CENTS, )  
) )  
Defendants. )

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**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

**INTRODUCTION**

Malinda Harris (Harris), the mother of Trevice Harris (deceased), seeks dismissal of the Commonwealth’s forfeiture Complaint. Harris owns the 2011 Infiniti G37 (“the car”) subject to this action. The Complaint alleges no inappropriate conduct of any kind with respect to the car. Further, the Complaint alleges no wrongdoing on Harris’ part. In fact, the Complaint does not mention Harris at all.

Malinda Harris seeks judgment on the pleadings. First, the Commonwealth unreasonably delayed seeking forfeiture in this case, filing the Complaint *58 months* after seizure. This due process violation alone requires dismissal of the Complaint.

Second, the Complaint fails to allege facts that demonstrate probable cause to seize the car, and Harris should therefore receive judgment on the pleadings because the Commonwealth is unable to even allege a *prima facie* case to support forfeiture.

Third, Massachusetts General Laws ch. 94C, § 47(d) (“Forfeiture Statute”) is unconstitutional under both the federal and Massachusetts constitutions because it permits forfeiture of an innocent person’s property. Harris is an innocent owner. The Commonwealth’s Complaint and accompanying Affidavit (filed January 10, 2020) make no allegation whatsoever that Malinda Harris committed any crime or did *anything* wrong. As recent United States Supreme Court<sup>1</sup> precedent makes clear, it is unconstitutional to forfeit her property because she is an innocent owner.

The Forfeiture Statute is unconstitutional for three additional, independent reasons, grounds that apply to any forfeiture matter: 1) the Forfeiture Statute provides an unconstitutional profit incentive for enforcement authorities; 2) the Forfeiture Statute improperly places the burden of proof on the property owner; and 3) the Forfeiture Statute provides no post-seizure remedy or hearing, and also provides no deadline for the Commonwealth to file the forfeiture complaint.

## **ARGUMENT**

### **I. The Commonwealth’s unreasonable delay requires dismissal of the complaint.**

The Commonwealth seized the property at issue in this case in March 2015. Almost five years later, on January 10, 2020, the Commonwealth filed this Complaint. It did not serve the Complaint on Harris until October 2020. The Commonwealth has offered no justification for

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<sup>1</sup> *Timbs v. Indiana*, 139 S.Ct. 682 (2019).

why it took almost five years to file this suit or another 10 months to serve it. This lengthy, unexplained delay deprived Harris of due process and requires that the Complaint be dismissed. “[A] post-seizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time.” *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 562-63 (1983). The remedy for such a violation is dismissal of the Complaint. *In re Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 311 n.3 (1st Cir. 1988).

The Court looks to four non-exclusive factors in evaluating whether the government’s delay requires dismissal of the Complaint: length of delay, reason for the delay, the claimant’s assertion of any right to seek remission of the forfeiture, and prejudice to the defendant. *Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. at 564. “[N]one of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied – ” *Id.* at 565.

#### **A. The Length of the Delay**

This factor weighs decisively against the Commonwealth, which waited 58 months to file the Complaint seeking forfeiture, and an additional 10 months to serve it on Harris. A 15-month delay, without a reasonable explanation, warrants finding a due process violation. *United States v. \$12,248 U.S. Currency*, 957 F.2d 1513, 1516 (9<sup>th</sup> Cir. 1991). “Although no duration is per se unconstitutional,” delay of as little as 33 months is a “significant period[] of time in comparison with other instances of delay held to violate a claimant’s right to due process.” *United States v. \$19,440 in U.S. Currency*, 829 F.Supp 303, 306 (D. Alaska 1993) (citing cases holding that 13-month delay and 18-month delay violated due process).

## **B. The Reason for the Delay**

A delay as little as 18 months violates due process if the government cannot provide a good explanation as to why it delayed initiating forfeiture proceedings. *United States v. One 1984 Nissan 300 ZX*, 711 F.Supp 1570, 1572 (N.D. Ga. 1989). In this case, the Complaint provides no reason justifying the delay of five years. Nor did the Commonwealth offer any reason when Harris requested an explanation from the Assistant District Attorney as to why the Commonwealth waited 58 months to file the Complaint and an additional 10 months to serve it.<sup>2</sup> This factor weighs heavily against the Commonwealth.

## **C. The complaint's assertion of any right to seek remission of the forfeiture**

This factor is not applicable, because Massachusetts law provides no avenue for a claimant to challenge the forfeiture until the Commonwealth files the Complaint, and Massachusetts law provides no deadline for the Commonwealth to initiate forfeiture proceedings. This means there was no mechanism for Harris to seek the return of the property until the state served her with the Complaint.

## **D. Prejudice**

The longer the period of delay on the part of the government, the less important the prejudice factor. For example, an unexplained 18 month delay results in a due process violation requiring dismissal regardless of the prejudice to the owner. *One 1984 Nissan 300 ZX*, 711 F. Supp at 1573. The Forfeiture Statute requires Harris to bear the burden of proving she is an innocent owner. Because of the passage of time, and the failure to date of the Commonwealth to

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<sup>2</sup> When asked for an explanation for the delay, the Assistant District Attorney could not offer any: "I was not with BDAO at the time and will have to reach out to obtain said information for you." (E-mail from Talmadge to Silverman, January 20, 2020, attached as Exhibit A).

make *any* accusation against Malinda, at this point Malinda would be substantially prejudiced with respect to whatever accusations may be forthcoming from the Commonwealth.

**II. The Complaint makes no allegations or accusations regarding Malinda Harris.**

In ruling on a motion for judgment on the pleadings, the Court considers the well pleaded factual allegations in the complaint as true, and considers whether those facts would support judgment for the non-moving party. *Jarosz v. Palmer*, 766 N.E.2d 482, 486-87 (Mass. 2002). In addition, in this case, the Commonwealth's Affidavit (incorporated by reference into its Complaint) makes a patently incorrect factual assertion. Contrary to the Commonwealth's allegations, Malinda Harris does own the vehicle. Harris has contemporaneously filed a Request for Judicial Notice that she, and not her son, Trevice, owns the car.<sup>3</sup>

The Commonwealth makes only two factual accusations regarding the car:

- 1) They seized the vehicle title from Trevice's bedroom. Gero Aff., ¶ 22, Item #9.
- 2) They searched the car on March 4, 2015, and found only "occupancy papers," two parking tickets, and a "Jiffy Lube receipt." *Id.*, ¶ 26.

That is the *sum total* of the factual allegations regarding Malinda Harris' car. On the other hand, the Affidavit makes a number of allegations regarding the use of other vehicles in actually transporting controlled substances. The Affidavit describes a Toyota Camry used to transport controlled substances on February 26, 2015. *Id.*, ¶¶ 10-12. It describes a Nissan Maxima used to transport controlled substances on March 2, 2015. *Id.*, ¶¶ 13-14. And it describes a Toyota Yaris

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<sup>3</sup> The Court, by taking judicial notice that Malinda Harris is the owner of the Infiniti, does not convert the motion into a motion for summary judgment. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 377-78 (Mass. 2000) (taking judicial notice of facts from public records does not convert a motion to dismiss into a motion for summary judgment).

(owned by the girlfriend of the suspect) used to transport controlled substances on March 3, 2015. *Id.*, ¶¶ 16-18. It contains no such allegations with respect to Harris' Infiniti.

**III. The Complaint does not allege facts sufficient to find probable cause to forfeit Harris' car.**

Based on the factual allegations in the Complaint, the only accusations regarding Malinda Harris are that she owned an automobile that contained "occupancy papers," parking tickets, and a Jiffy Lube receipt, and the title to the vehicle was found in her son's bedroom closet.<sup>4</sup>

This is plainly insufficient to establish probable cause for the forfeiture. The Massachusetts Supreme Judicial Court set forth the minimum factual showings necessary to establish a *prima facie* case to support forfeiture under the forfeiture statutes in *Commonwealth v. One 1969 Mercedes-Benz Automobile*, 378 N.E.2d 65 (1978), where the facts were much more compelling than here, yet were still insufficient to meet the Forfeiture Statute's probable cause requirement. At trial in that case, the police testified they were conducting surveillance on the claimant's residence when they observed him leave his house, get into a car that pulled into his driveway, talk to the driver for 30 seconds to one minute, and then begin driving away from his residence. *Id.* at 66. The police then stopped the vehicle and the claimant and the driver submitted to searches. A small quantity of heroin was found on the driver, but not the claimant. *Id.* The police then obtained a search warrant for the claimant's residence, and found a small amount of heroin and one pound of cannabis. *Id.*

The Court held this was insufficient to establish probable cause to forfeit the car. It held that the Forfeiture Statute applied only to vehicles that have "been used, or has been intended for

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<sup>4</sup> Although not germane to this Motion, Malinda Harris was homeless and living in a shelter at the time the car was seized.

use, in the ‘business’ of ‘manufacturing, dispensing or distributing’ controlled substances.” *Id.* at 68. On the other hand, “the mere personal possession of a controlled substance by one traveling in a vehicle would not constitute sufficient grounds” to support forfeiture. *Id.* Likewise, the small amount of heroin found in the claimant’s home did not indicate anything other than “personal use.” *Id.*

The facts here are far less compelling. The car had *no* controlled substances or other suspicious items. Unlike other vehicles that the police observed actually transporting drugs, the police never observed the Infiniti (regardless of who was driving) engaging in *any* suspicious activity. Likewise, the Affidavit is completely silent as to Malinda. Other than the fact that the vehicle title was in her son’s bedroom, the Complaint contains no facts whatsoever making even a remote connection between her car and the allegations against her son. *One 1969 Mercedes-Benz* sets the minimum factual showing required to forfeit an automobile. The Complaint falls far short of that minimum, and Harris should receive judgment on the pleadings.

#### **IV. The Forfeiture Statute unconstitutionally permits the forfeiture of an innocent owner’s property.**

The forfeiture sought by the Commonwealth in this case is considered “punishment,” which subjects it to review under the Excessive Fines Clauses of the United States Constitution and the Massachusetts Declaration of Rights. *Pub. Emp. Ret. Admin. Comm’n (PERAC) v. Bettencourt*, 47 N.E.3d 667, 672 (Mass. 2016) (holding that the Excessive Fines clause applies to civil forfeitures). If a forfeiture has any element of punishment to it, it is subject to review under the Excessive Fines Clause of the Eighth and Fourteenth Amendments to the United States Constitution and Article 26 of the Massachusetts Declaration of Rights. *PERAC*, 47 N.E.3d at 677. And forfeiture under the Forfeiture Statute “is punitive because it results in total loss of the

property” even if it often serves a remedial purpose. *Commonwealth v. One 1972 Chevrolet Van*, 431 N.E.2d 209, 211 (Mass. 1982).

As recent United States Supreme Court precedent makes clear, forfeiture is punishment, and any punishment imposed must be at least grossly proportional to the crime. *Timbs*, 139 S.Ct. at 686, 689–90. Given that punishment must be proportional to the property owner’s wrongdoing, in the case of an innocent owner, *any* punishment would be disproportionate. The Indiana Supreme Court on remand in *Timbs* expressly recognized this. Any “forfeiture is necessarily excessive—because it punishes someone who has done nothing wrong.” *State v. Timbs*, 134 N.E.3d 12, 34 (Ind. 2019). “[I]f a claimant is entirely innocent of the property’s misuse, that fact alone may render a use-based *in rem* fine excessive.” *Id.* at 37-38.

The Excessive Fines Clause demands proportionality between the property owner’s culpability and the amount of the fine. *See e.g., PERAC*, 47 N.E.3d at 678 (forfeiture of pension valued at least \$659,000 excessive to police officer convicted of 21 counts of unauthorized access to a computer system); *State Bd. of Ret. v. Finneran*, 71 N.E.3d 1190, 1198-99 (Mass. 2017) (forfeiture of pension valued at \$433,400 not excessive to legislator convicted of felony obstruction of justice); *MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1056 (Mass. 2000) (forfeiture of pension worth \$400,000 not excessive to legislator convicted of conflict of interest that resulted in \$512,000 in illicit gains).

By any measure, the forfeiture of the car here violates the Excessive Fines Clause. Although the underlying drug offenses are serious, Harris has no culpability at all. The Commonwealth cannot seize and forfeit her car simply because her son was accused of a crime. Punishment without wrongdoing violates the very foundation of the justice system. Any



forfeiture of Harris' property would be disproportionate, because she did not commit any crime or engage in any wrongdoing.

**V. The Forfeiture Statute provides an unconstitutional profit motive to the police and the District Attorney.**

Due process prohibits “any ‘procedure which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused.’” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted, emphasis added). The Forfeiture Statute here provides an unconstitutional profit motive because all of the proceeds go directly to the agencies that seized and forfeited the property, instead of the state treasury. Mass. Gen. Laws ch. 94C, § 47(d).

Due process demands that government officials be committed to serving the public interest, not their own. Direct financial incentives are particularly problematic. *See e.g., Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927). In *Ward*, for instance, a citizen charged with traffic offenses claimed that trial before the village's mayor violated due process, since “[a] major part of village income is derived from the fines, forfeitures, costs, and fees imposed by [the mayor] in his mayor's court.” 409 U.S. at 58. The Court agreed, reasoning that even though no money went directly into the mayor's pocket, he would face institutional pressure “to maintain the high level of contribution.” *Id.* at 60. Moreover, this was true no matter whether the citizen could show actual bias, as due process protects against a financial incentive that would offer “a possible temptation to the average man.” *Tumey*, 273 U.S. at 532.

This same principle limits the financial incentives of police and prosecutors. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Court acknowledged that due process applies to

prosecutors, noting that “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.” *Id.* at 249-50. The Court also made clear that a personal benefit is not required; due process would also be violated if the officer’s “judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement.” *Id.* at 250. And the Court stressed that this is true regardless of whether enforcement personnel are actually biased, so long as bias is a “realistic possibility.” *Id.*

Courts have found forfeiture laws similar to Massachusetts have an inappropriate and unconstitutional profit motive. In *Harjo v. City of Albuquerque*, 307 F.Supp.3d 1163 (D.N.M. 2018), for example, all of the forfeited proceeds were retained and controlled by the city officials running the forfeiture program. That violated due process because “it is plausible that the program’s dependence on forfeiture revenues threatens officials’ salaries” and unconstitutional “profit incentive exists when officials’ level of enforcement can affect how much they are paid.” *Id.* at, 1208.

*Flora v. Sw. Iowa Narcotics Enforcement Task Force*, 292 F.Supp.3d 875, 901 (S.D. Iowa 2018), reached a similar result. In *Flora*, the police and prosecutors kept 90 percent of the civil asset forfeiture proceeds and ten percent was paid to the state treasury. The court held that this arrangement could violate due process. First, although the program purported to check “excessive” forfeitures, which have a different distribution schedule, “excessive” is not defined. Instead, the task force supervisor made the sole determination as to what was excessive or not. *Id.* at 904. In Massachusetts, the police and prosecutor keep all of the proceeds regardless of whether the forfeiture is excessive. In addition, just as in *Harjo* and this case, the arrangement between police and prosecutors in *Flora* “does not limit forfeiture shares to expenses accrued by

[the police and prosecutors] in pursuing the forfeitures in order to reduce the potential for bias.”

*Id.*

The Albuquerque vehicle forfeiture program in *Harjo* violated due process because it incentivized police and prosecutors to raise as much money as possible. The Forfeiture Statute does the same. The Iowa drug task force agreement in *Flora* violated due process because police and prosecutors kept 90 percent of the proceeds. Here, the office prosecuting this case, the Berkshire County District Attorney, and the Berkshire County Law Enforcement Task Force, will keep 100 percent of the forfeited proceeds. The temptation to overzealously pursue forfeiture cases is more stark in this case than in *Harjo* and *Flora*. Harris respectfully requests that the Court declare the Forfeiture Statute unconstitutional because of the improper policing for profit incentive.

#### **VI. Requiring property owners to prove their innocence violates the due process clause.**

The Forfeiture Statute violates due process by requiring an innocent owner to prove her innocence. Mass. Gen. Laws, ch. 94C § 47(d). Forcing people to prove their own innocence gives rise to an unacceptable risk of erroneous deprivation. *Nelson v. Colorado*, 137 S.Ct. 1249, 1256-57 (2017). The Court explained that imposing such a burden on people trying to get their property back in a civil proceeding violates the “[a]xiomatic and elementary” principle that individuals are “entitled to be presumed innocent.” *Id.* at 1255-56 (citation omitted). *Nelson* invalidated a statute that required defendants whose convictions are overturned to prove their innocence to get their property back. The *Nelson* principle also applies to civil *in rem* forfeitures. The Albuquerque vehicle forfeiture program’s requirement that a property owner “prove his or her innocence once the [government] has shown that it has probable cause to seize ... creates

such a risk of erroneous deprivation that it violates procedural due process.” *Harjo*, 326 F.Supp.3d at 1207. For that reason alone it is unconstitutional.

**VII. The Forfeiture Statute’s failure to provide a reasonable post-seizure remedy violates due process.**

The Forfeiture Statute provides for no prompt pre- or post-seizure hearing. Once the government has seized the property, the owner can do nothing until the Commonwealth files the Complaint for forfeiture. The Forfeiture Statute does not dictate that owners be provided prompt, post-seizure hearings to challenge, among other things, the validity of the seizure and the continued retention of the property pending the forfeiture proceeding’s final outcome. This omission creates too big of a risk of erroneous deprivation. *Matthews v. Eldrige*, 424 U.S. 319, 335 (1976). The opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Here, there is no opportunity to be heard, at least, as this case demonstrates, until the Commonwealth files the complaint seeking forfeiture, which can be weeks, months or even years after the seizure.

**CONCLUSION**

Harris respectfully requests that the Court dismiss the Complaint because the Commonwealth’s unreasonable, lengthy delay violates the due process clause. Alternatively, Harris respectfully requests judgment on the pleadings in her favor because the Complaint does not allege a *prima facie* case of probable cause as to her. Also, Harris respectfully requests that the Court find the Forfeiture Statute is unconstitutional.

Respectfully submitted,

MALINDA HARRIS,

By her attorneys,

/s/ Stephen Silverman

Stephen Silverman

*(pro hac vice application pending)*

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February 25, 2021

**CERTIFICATE OF SERVICE**

I, William K. Wray, Jr., hereby certify that on this 25th day of February, 2021, a true and accurate copy of the foregoing Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings was served via regular, first-class United States mail, postage prepaid and via email, upon the following:

R. Talmadge Reeves, Esq.  
Berkshire District Attorney's Office  
7 North St.  
Pittsfield, MA 01202  
Talmadge.reeves@state.ma.us  
*Attorney for Plaintiff*

/s/ William K. Wray, Jr.

**Exhibit A**  
**to Memorandum of Points & Authorities**  
**in Support of Motion for Judgment on the Pleadings**

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**From:** Reeves, Talmadge (DAA) <talmadge.reeves@state.ma.us>  
**Sent:** Wednesday, January 20, 2021 12:14 PM  
**To:** Stephen Silverman <ssilverman@goldwaterinstitute.org>  
**Subject:** RE: Malinda Harris (Docket No. 2076CV00007)

Stephen,

My schedule is flexible next week and I'd be happy to have our telephonic conference at that time. Is there a specific date/time that would work best for you? Concerning the filing and service timeline I was not with BDAO at that time and will have to reach out to obtain said information for you. I would be remiss if I did not again inquire as to whether Ms. Harris knows the names and addresses of Trevice's two minor children. If you have this information it would serve to expedite the resolution of this case.

Sincerely,

**R. Talmadge Reeves | Assistant District Attorney**  
Berkshire District Attorney's Office  
7 North Street  
Pittsfield, MA 01201  
Office: (413) 443-5951  
Cell: (413) 822-4882





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**From:** Stephen Silverman <[ssilverman@goldwaterinstitute.org](mailto:ssilverman@goldwaterinstitute.org)>  
**Sent:** Wednesday, January 20, 2021 1:35 PM  
**To:** Reeves, Talmadge (BER) <[Talmadge.Reeves@MassMail.State.MA.US](mailto:Talmadge.Reeves@MassMail.State.MA.US)>  
**Subject:** RE: Malinda Harris (Docket No. 2076CV00007)

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Talmadge:

I have not received a response to my e-mail of January 18. When can we schedule a telephonic conference?

Also, please let me know the reason for the 58 month delay in filing the forfeiture complaint, and the 10 month delay in serving Malinda.

Thank you.

**Stephen Silverman**

Senior Attorney

Goldwater Institute | [www.GoldwaterInstitute.org](http://www.GoldwaterInstitute.org) | 602.462.5000

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**From:** Stephen Silverman