
Civil Rights Impacts of Civil and Criminal Asset Forfeitures in New Jersey



**A Report of the New Jersey Advisory Committee to
the U.S. Commission on Civil Rights**

October 2021

The United States Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice; to serve as a national clearinghouse for information with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; to submit reports, findings, and recommendations to the President and Congress; and to issue public service announcements to discourage discrimination or denial of equal protection of the laws.

Advisory Committees to the U.S. Commission on Civil Rights

The Commission maintains 56 State and U.S. Territory Advisory Committees (STACs). Each is composed of citizen volunteers familiar with local and state civil rights issues. The members assist the Commission with its fact-finding, investigative, and information dissemination functions.

The Commission seeks to ensure that advisory committees are broadly diverse and represent a variety of backgrounds, skills, experiences, and perspectives. This diversity promotes vigorous debate and full exploration of the issues. All appointments are made in a non-discriminatory manner.

Commissioners are responsible for appointments to the advisory committees. Commissioners vote on individual appointments upon submission of recommendations by the staff director. The term of service for a committee member is four years with a total duration of not more than eight years (or two four-year terms) unless there is sufficient basis for extending the appointment to 12 years.

Advisory Committee Reports

This report is the work of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights. The report relies on statements, studies, reports, articles, and data provided by third parties. State Advisory Committee reports are wholly independent and reviewed by Commission staff only for legal and procedural compliance with Commission policies and procedures. Committee reports are not subject to Commission approval, fact-checking, or policy changes. The views expressed in this report, including the findings and recommendations, are those of all New Jersey Advisory Committee members, who voted for the Report at a public meeting and do not necessarily represent the views of the Commission or its individual members or of the policies of the U.S. Government.

Transmittal Letter

New Jersey Advisory Committee to the
U.S. Commission on Civil Rights

Members of the Commission:

Norma V. Cantú, Chair

J. Christian Adams

Debo P. Adegbile

Stephen Gilchrist

Gail Heriot

Peter N. Kirsanow

David Kladney

Michael Yaki

Mauro Morales, Staff Director:

The New Jersey Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report titled, *Civil Rights Impacts of Civil and Criminal Asset Forfeitures in New Jersey*. The report was adopted by all nine of the Advisory Committee members who attended a public meeting on August 20, 2021.

Sincerely,

Lawrence S. Lustberg

Lawrence S. Lustberg, Chair
New Jersey Advisory Committee

New Jersey Advisory Committee Members:

Lawrence S. Lustberg, Chair
(Chatham)

Sahar Aziz
(Westfield)

Joan Rivitz
(Paramus)

Marcia W. Brown
(Long Branch)

Saulo Santiago
(Verona)

Brian M. Gaffney
(Morristown)

Amol Sinha
(Glen Ridge)

Manuel Garcia
(Warren)

John Stanley, Jr.
(Wyckoff)

Erica Jedynak
(Rockaway Township)

William J. Stephney
(Rockaway)

Donita Judge, Vice-Chair
(Denville)

Kristian Stout
(Robbinsville)

Pearl Park
(Summit)

Frank D. Tinari
(Florham Park)

Acknowledgments

The New Jersey Advisory Committee thanks all those who shared their expertise with the Committee members at the 2020 virtual panel briefings held on September 21, November 17, and 19; Kristian Stout who proposed this topic to the Committee, as its civil rights project and chaired the Forfeiture Planning Workgroup and the Workgroup members—Sahar Aziz, Lawrence S. Lustberg, Amol Sinha, William J. Stephney, Kristian Stout, and Frank D. Tinari—who helped set the agenda, and identified and interviewed the expert presenters; the Drafting Team who oversaw the written report—Lawrence S. Lustberg, Amol Sinha and Kristian Stout; and the Commission staff persons assigned to the New Jersey Advisory Committee—Ivy Davis, Director of the Eastern Regional Office of the U.S. Commission on Civil Rights and Designated Federal Officer, and Evelyn Bohor, Program Specialist, whose assistance, guidance and support throughout this review were extraordinary and invaluable. The Committee also offers special thanks to Joe Johnson, Legal/Policy Fellow at the American Civil Liberties Union of New Jersey, Newark, New Jersey; Joe, working under the supervision of Drafting Team members, provided immeasurable assistance in drafting and finalizing this Report.

TABLE OF CONTENTS

TRANSMITTAL LETTER	i
NEW JERSEY ADVISORY COMMITTEE MEMBERS	ii
ACKNOWLEDGEMENTS	iii
TABLE OF CONTENTS	iv
REPORT	
I. Introduction	1
II. New Jersey Overview	6
III. Summary of Testimony	
A. Purpose of Asset Forfeiture	8
<u>Deterrence and Restitution</u>	8
B. Issues with Asset Forfeiture Generally	9
<u>Revenue Incentive</u>	9
<u>Impact on Low-Income Individuals</u>	10
<u>Prevalence in African American Communities</u>	11
<u>Consequences of Forfeiture</u>	12
C. Issues with Civil Asset Forfeiture	
<u>Lack of Due Process Protections</u>	13
<u>Legal Burdens</u>	13
<u>Difficulty Defending Case</u>	14
D. Recent Reforms	
<u>Other States</u>	14
<u>New Jersey</u>	16
IV. Findings and Recommendations	
Finding 1: Profit Incentive	16
Recommendation 1: Require Profits Go to General Fund	16
Finding 2: Default Judgments	17
Recommendation 2: Right to Counsel	17
Finding 3: Improper Burden	17
Recommendation 3: Increase Government Burden	18

Finding 4: Federal Equitable Sharing Program	18
Recommendation 4: End Participation in Federal Equitable Sharing Program	18
Finding 5: Lack of Criminal Convictions	18
Recommendation 5: Require A Criminal Conviction in All Asset Forfeiture Cases	19
Finding 6: Due Process Concerns in Civil Asset Forfeiture	19
Recommendation 6: End the Use of Civil Asset Forfeiture	19
Finding 7: Lack of Research	19
Recommendation 7: Establish Legal Financial Obligations Commission	19

V. Conclusion

APPENDICES

Appendix 1: Virtual Briefing Agendas on Civil Rights Impact of Criminal Records on Access to Occupational Licenses

- September 21, 2020: Panel of National Experts	21
- November 17, 2020: Panel of New Jersey Experts	22
- November 19, 2020: Panel of New Jersey Experts	23

Appendix 2: Submitted Panelists' Written Statements and Memoranda

- Emehelu, Shirley (Nov. 17, 2020)	24
- Glod, Greg (Sept. 21, 2020)	42
- Hoffman, Christine (Nov. 17, 2020)	48
- Koufos, John (Sept. 21, 2020)	55
- Link, Nathan Wong (Sept. 21, 2020)	64
--Follow-up Memo	74
- Sanzone, Jr., Vincent (Sept. 21, 2020)	76
- Shalom, Alexander (Nov. 19, 2020)	81

Appendix 3: Additional Documents for the Record

- Rebeca Goldstein, Michal W. Sances and Hye Young Yu, "Exploitative Revenues, Law Enforcement, and the Quality of Government Service," *Urban Affairs Review* 56, no. 1 (2020): 5-31, at: <https://journals.sagepub.com/doi/full/10.1177/1078087418791775>
- Sances, Michael W., and Hye Young You. "Who pays for government? Descriptive representation and exploitative revenue sources," *The Journal of Politics* 79, no. 3 (2017): 1090-1094.
- Link, Nathan W. "Paid Your Debt to Society? Court-related Financial Obligations and Community Supervision during the First Year after Release from Prison," *Corrections* (2021): 1-17, at: <https://www.tandfonline.com/doi/abs/10.1080/23774657.2021.1878072>

- Link, Nathan, Jordan M. Hyatt, and Ebony Ruhland. "Monetary Sanctions, Legal and Collateral Consequences, and Probation & Parole: Where Do We Go from Here?," *UCLA Criminal Justice Law Review* 4, no. 1 (2020), at: <https://escholarship.org/uc/item/4w8022j5>
- Ian MacDougall, "Police Say Seizing Property Without Trial Helps Keep Crime Down. A New Study Shows They're Wrong," *Propublica*, (Dec. 14, 2020), at: <https://www.propublica.org/article/police-say-seizing-property-without-trial-helps-keep-crime-down-a-new-study-shows-theyre-wrong>
- Menendez, Matthew, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison. "The steep costs of criminal justice fees and fines," *New York: Brennan Center for Justice at NYU Law School* (2019), at: <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>
- U.S. Department of Justice, *Money Laundering and Asset Recovery Section (MLARS)*, accessed Oct. 6, 2021, at: <https://www.justice.gov/criminal-mlars>

I. Introduction

Asset forfeiture laws allow the government to seize property based on the suspicion that the property is in some way tied to a crime.¹ Originally conceived as a means of reducing criminality and providing justice for victims of crimes,² proponents of asset forfeiture also argue that the practice achieves its goals by removing instrumentalities of crime from circulation, punishing individuals for engagement in criminal activity, and repurposing the profits from criminal activity to benefit victims of crimes through restitution.³ However, critics of asset forfeiture argue that the current iteration of the practice largely fails to achieve these goals.⁴ Moreover, and perhaps more significantly for purposes of this report, asset forfeiture reflects many of the criminal justice system's deeply unfair procedures and biased outcomes.⁵ This report discusses the practice of asset forfeiture in general, as well as its form and use in New Jersey.

There are two distinct types of asset forfeiture proceedings, one civil and the other criminal.⁶ In civil forfeiture proceedings, the state brings an action against a person's property rather than against the individual.⁷ In contrast, criminal asset forfeiture involves the state bringing an action seeking to take a person's property as part of a criminal prosecution.⁸

Federal and state statutes, regulations, and rules provide for asset forfeiture laws.⁹ While there is no comprehensive accounting of the amount that law enforcement agencies across the country have seized, experts have found that asset forfeiture "send[s] billions of dollars to government

¹ See Lisa Knepper et. al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3rd Ed.), INSTITUTE FOR JUSTICE (Dec. 2020), 5, at: <https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf>.

² Christine Hoffman, Acting County Prosecutor, Gloucester County, NJ, testimony, *Virtual Panel Before The New Jersey Advisory Committee in the U.S. Commission on Civil Rights*, November 17, 2020, transcript, p. 6 (hereafter Nov. 17, 2020, *Virtual Panel*).

³ Stefan D. Cassella, Forfeiture is Reasonable, and It Works, THE FEDERALIST SOCIETY (May 1, 1997), at: <https://fedsoc.org/commentary/publications/forfeiture-is-reasonable-and-it-works>.

⁴ Alex Shalom, Senior Supervising Attorney and Director of Supreme Court Advocacy, ACLU of New Jersey, Newark, NJ, testimony, Nov. 19, 2020, *Virtual Panel*, transcript, p. 5; Greg Glod, Senior Criminal Justice Fellow, Americans for Prosperity, Arlington, VA, testimony, Sept. 21, 2020, *Virtual Panel*, transcript, p. 4.

⁵ See, e.g., *Civil Asset Forfeiture: Unfair, Undemocratic, and Un-American*, SOUTHERN POVERTY LAW CENTER (Oct. 30, 2017), at: https://www.splcenter.org/sites/default/files/com_policybrief_civil_asset_forfeiture_web.pdf. (hereafter *SPLC – Civil Asset Forfeiture*).

⁶ See, e.g., John Koufos, National Director of Reentry Initiatives, Right on Crime, Austin, TX, prepared memorandum, for Sept. 21, 2020, *Virtual Panel*, at 1 (hereafter *Koufos prepared memo*).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ See, e.g., 21 U.S.C § 853; Fed. R. Crim. P. 32.2; N.J.S.A. 2C:64-1. See also Knepper et. al. *supra* note 1, at 5.

coffers.”¹⁰ Many states allow law enforcement to keep most or all of the assets that they seize.¹¹ As well, the Federal Equitable Sharing Program authorizes the Department of Justice to share federally forfeited property with state and local law enforcement agencies.¹² Thus, even if a state legislature passes laws that reform asset forfeiture protocols within a given jurisdiction, state and local law enforcement agencies can circumvent these laws and receive up to 80% of the proceeds from the Equitable Sharing Program.¹³

Thus, embedded within both of these kinds of proceedings is an unseemly profit motive for police departments performing their law enforcement duties.¹⁴ As a result, police departments persistently surveil, harass, and arrest people to seize their property.¹⁵ The result is that persons in communities of color are disproportionately the subject of asset forfeitures.¹⁶ For example, although Black men make up just 13% of South Carolina’s population, they account for 65% of instances of asset forfeiture in the state.¹⁷ Closer to home, a 2018 report published by the ACLU of New Jersey (ACLU-NJ) analyzed asset forfeiture data from 2016 and found that Black and Latinx New Jerseyans were disproportionately impacted as they were more likely to be stopped by police and areas of New Jersey with higher populations of people of color experienced more numerous seizures.¹⁸ According to a report in Oklahoma that examined forfeiture cases involving seizures of

¹⁰ Knepper et. al., *supra* note 1, at 5.

¹¹ Glod prepared memo for the Sept. 21, 2020, Virtual Panel, at 3.

¹² See 21 U.S.C. § 881(e)(1)(A), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a; 31 U.S.C. § 9705(b)(4)(A) and (b)(4)(B).

¹³ Knepper et. al., *supra* note 1, at 6.

¹⁴ See Knepper et. al., *supra* note 17/27: ILD √; David Slayton, *Asset Forfeiture in Texas: DPS and County Interactions*, Texas Office of Court Administration (Dec. 2014), at: <https://www.txcourts.gov/media/782473/sting-report-final.pdf>.

¹⁵ See Phil Ciciora, *Are Law Enforcement Agencies Abusing Civil Asset Forfeiture?*, ILLINOIS NEWS BUREAU (Apr. 13, 2017), at: <https://news.illinois.edu/view/6367/487451>.

¹⁶ See SPLC – *Civil Asset Forfeiture*, *supra* note 5; Anna Lee et. al., *TAKEN: How Police Departments Make Millions by Seizing Property*, GREENVILLE NEWS (updated Apr. 22, 2020) (noting that, while Black men represent just 13% of South Carolina’s population, they constitute 65% of all forfeitures).

¹⁷ South Carolina Civil Forfeiture Disproportionately Targets Black Men, EQUAL JUSTICE INITIATIVE (Mar. 4, 2019), <https://eji.org/news/south-carolina-civil-forfeiture-disproportionately-targets-Black-men/>.

¹⁸ Civil Asset Forfeiture: A 5-Month Snapshot in New Jersey, ACLU-NJ (2018), <https://www.aclu-nj.org/?cID=1333>. This data from 2016, compiled in 2018, is the most recent data for New Jersey made available to the Committee. Throughout, the most recent data for each state discussed was used; though the variability in these dates make comparisons imperfect, the Committee is confident that those differences do not affect its conclusions, other than that they make the need to collect data, discussed in Finding and Recommendation 7 below, all the more obvious.

It should also be noted that the racial disparities discussed in the text are based on the number of incidences of forfeiture and not on the total dollar value of the properties forfeited, which, as the referenced ACLU Report shows, may in fact be greater in less diverse, wealthier communities.

\$5,000 or more across 10 counties between 2010-2015, 65% of forfeiture cases involved solely minority groups.¹⁹ And a report from California analyzing the proceeds that the state obtained through the Equitable Sharing Program found that 85% of the proceeds went to agencies that police neighborhoods composed by a majority people of color.²⁰ These reports indicate that the same racial disproportions by which people of color have greater contact with the criminal justice system and receive harsher punishments²¹ than do whites, are reflected, as well, then, in the asset forfeiture context too. That said, and although racial disparities in asset forfeiture appear very clearly to be an issue based on the current, limited research, additional data collection is needed both nationally and locally to quantitatively identify the full extent of this issue.

In addition to the biased targeting of vulnerable communities, asset forfeiture laws, and legal procedures pose additional obstacles to people retrieving their property. That is, once the government²² seizes a person's property, that person has limited options that depend on whether the asset forfeiture proceeding is civil or criminal. In a civil proceeding, there is no right to a lawyer, meaning that there are massive costs associated with challenging an asset seizure.²³ These include paying for legal representation to respond to the government's suit, paying a fee to challenge the seizure, and paying for further legal representation should the matter go to trial.²⁴ Further, even if a person is able to mount a challenge to a seizure, the government has a tremendous advantage given its low burden to prove by a preponderance of the evidence that the property was used in a crime.²⁵

¹⁹ Clifton Adcock et. al., Most Police Seizures of Cash Come from Blacks, Hispanics, OKLAHOMA WATCH (Oct. 7, 2015), at: <https://oklahomawatch.org/2015/10/07/most-police-seizures-of-cash-come-from-blacks-hispanics/>.

²⁰ *Civil Asset Forfeiture: Profiting from California's Most Vulnerable*, ACLU-CALIFORNIA (May 2016), at: https://www.aclunc.org/docs/aclu_california_civil_asset_forfeiture_report.pdf.

²¹ Thus, for example, the data is clear that Black and Hispanic people are more likely to be arrested than white people, Radley Balko, *There's Overwhelming Evidence That The Criminal Justice System Is Racist. Here's The Proof*, The Washington Post (June 10, 2020), at: <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>. As well, Black and Hispanic adults are incarcerated at 5.9 and 3.1 times the rate for white adults, respectively, Report of the Sentencing Project, *Racial Disparities in the United States Criminal Justice System*, The Sentencing Project (March 2018), file:///C:/Users/bthomas/Downloads/UN-Report-on-Racial-Disparities.pdf; "Black men are six times as likely to be incarcerated as white men and Hispanic men are 2.7 times" as likely and "more than 60% of the people in prison today are people of color," Fact Sheet, *Trends in U.S. Corrections*, The Sentencing Project (May 2021), at: <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf>. And this problem is particularly pronounced in New Jersey. See Ashley Nellis, *The Color Of Justice: Racial And Ethnic Disparity In State Prisons*, The Sentencing Project, p. 4 (June 14, 2016) (showing that in New Jersey, Black people are incarcerated at nearly 12 times the rate of White people—the highest race disparity of any State in the nation), at: <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

²² For purposes of this report, when the word "government" is used, it refers to federal, state, and local officials.

²³ *Private Property, Police Profit: Explaining and Reforming Civil Asset Forfeiture in New Jersey*, ACLU-NJ (2018), at: https://www.aclu-nj.org/files/2215/4453/4434/2018_ACLU_Civil_Asset_Forfeiture.pdf.

²⁴ Ibid.

²⁵ Knepper et. al., *supra* note 1, at 120.

When the government seizes a person's property, it produces devastating financial and personal effects, including prolonged involvement in the criminal justice system, persisting debt, and barriers to housing and employment.²⁶ These harms redound to the severe detriment of families of those whose property is seized and disproportionately impact people with low-incomes and minorities.²⁷

Proponents of asset forfeiture rely upon several arguments in support of the practice. For instance, governments that seize assets may use those assets to provide restitution to crime victims.²⁸ Additionally, supporters contend that asset forfeiture can carry punitive and deterrent effects, as it is intended to strip criminals of property that was used in or obtained from a crime.²⁹ In particular, asset forfeiture has always been conceived as a means of depriving large criminal syndicates of the funding needed to sustain their illegal enterprises.³⁰

However, commentators from across the ideological spectrum have effectively questioned whether asset forfeiture is achieving these purposes. For example, Greg Glod of Americans for Prosperity, described how asset forfeiture fails to defund large criminal enterprises, including those involved in the distribution of illicit drugs. And, as the Southern Poverty Law Center points out, “[t]he drug war has unduly harmed racial minorities, and its civil forfeiture provisions are no different.”³¹ Moreover, “[t]he profile of suspects who have their assets seized . . . ‘differ greatly from those of the drug lords, for whom asset forfeiture strategies were designed.’”³² Finally, while some jurisdictions use asset seizures to provide restitution, other jurisdictions use those profits to add to law enforcement budgets.³³

A similarly ideologically diverse cohort has described the unfair and harmful nature of asset forfeiture.³⁴ In *Leonard v. Texas*, Justice Thomas criticized “forfeiture operations [that] frequently

²⁶ See Nathan W. Link, Assoc. Professor, Rutgers University, Camden, NJ, prepared memorandum, *for the Sept. 21, 2020, Virtual Panel*, at 2, (hereafter *Link prepared memo*); Rebecca Vallas et. al., *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color*, CENTER FOR AMERICAN PROGRESS (2016), at 8-9, at:

²⁷ *Koufos prepared memo*, *supra* note 6, pp. 6-7.

²⁸ Christine Hoffman, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 8.

²⁹ Shirley Emehelu, Attorney, Chiesa Shahinian & Giantomasi PC, West Orange, NJ, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 15.

³⁰ See *Glod prepared memo*, *supra* note 11, p. 3.

³¹ *SPLC – Civil Asset Forfeiture*, *supra* note 5.

³² *Ibid.* (quoting J. Mitchell Miller and Lance Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, Justice Quarterly, at 332 (June 1993)).

³³ David Slayton, *supra* note 14.

³⁴ See, e.g., AFP, *Civil Asset Forfeiture: Unpopular and Unjust*, AMERICANS FOR PROSPERITY (Mar. 3, 2021), at: <https://americansforprosperity.org/civil-asset-forfeiture-unpopular-and-unjust/>; *Leonard v. Texas*, 137 S. Ct. 847 (2017); Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, ACLU (Mar. 15, 2019), at:

target the poor and other groups least able to defend their interests in forfeiture proceedings.”³⁵ Likewise, the ACLU has opposed asset forfeiture nationally and through state initiatives.³⁶ This broad ideological pushback has led these states, Nebraska, North Carolina, New Mexico and Maine to eliminate civil asset forfeiture altogether.³⁷

Nor should asset forfeiture be considered in a vacuum. Rather, asset forfeiture should be viewed as another legal financial obligation that has negative consequences for individuals and is, therefore, a barrier to reentry to those seeking to reintegrate into society following service of a sentence. Thus, forfeitures, like fines and fees, can lead to high levels of stress in affected individuals as well as their friends or families, and can lead to substance abuse, inability to find employment, and even recidivism.³⁸ The recent focus on the impact of fines and fees, which has led to reform elsewhere,³⁹ is as applicable to asset forfeiture as well, whether criminal or civil. For example, in 2020, California passed legislation eliminating 23 criminal fines or fees and forgiving any outstanding debt on those fees.⁴⁰ California has also implemented a pilot program across a few counties that provide the courts with access to an ability-to-pay calculator.⁴¹ Several states, including California, Maryland and Virginia have recently ended the practice of suspending driver’s licenses for nonpayment of fines and fees.⁴² Here in New Jersey, the Supreme Court issued an order in 2019 dismissing approximately 800,000 outstanding municipal cases and warrants for minor cases that had been pending for over 16 years, also in order to facilitate reentry.⁴³

<https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-didnt-put-nail-civil-asset-forfeitures>.

³⁵ *Leonard v. Texas*, 137 S. Ct. 847 (2017)

³⁶ See, e.g., Andersson, *supra* note 34; *Private Property, Police Profit: Explaining and Reforming Civil Asset Forfeiture in New Jersey*, ACLU-NJ (2018), at: https://www.aclu-nj.org/files/2215/4453/4434/2018_ACLU_Civil_Asset_Forfeiture.pdf.

³⁷ Knepper et. al., *supra* note 1, at 40; Legis. Doc. 1521, 130th Leg., 1st Spec. Sess. (Me. 2021).

³⁸ Link prepared memo, *supra* note 26, at 2.

³⁹ National Effort to Reform Harmful Fines and Fees Announces Local Champions, FINES AND FEES JUSTICE CENTER (May 26, 2020), at: <https://finesandfeesjusticecenter.org/2020/05/26/national-effort-to-reform-harmful-fines-and-fees-announces-local-champions/>.

⁴⁰ Courtney Sanders, California Criminal Fee Repeal a Big Step for Racial Justice, Equitable Policy, CENTER FOR BUDGET AND POLICY PRIORITIES (October 14, 2020), at: <https://www.cbpp.org/blog/california-criminal-fee-repeal-a-big-step-for-racial-justice-equitable-policy>.

⁴¹ California’s Ability-to-Pay Calculator Reduces Burden of High Fines and Fees on Drivers, CENTER FOR COURT INNOVATION (November 15, 2019), at: <https://www.courtinnovation.org/articles/california-ability-pay-calculator>.

⁴² Sanders, *supra* note 40.

⁴³ Colleen O’Dea, NJ Supreme Court Dismisses Massive Backlog of Municipal Cases and Warrants, NJ SPOTLIGHT NEWS (January 22, 2019), at: <https://www.njspotlight.com/2019/01/19-01-21-nj-supreme-court-dismisses-massive-backlog-of-municipal-cases-and-warrants/>.

II. New Jersey Overview

New Jersey's asset forfeiture practice reflects many of the worst trends described above. Between 2009 and 2019, New Jersey law enforcement agencies accumulated \$166 million under New Jersey state law.⁴⁴ This includes the \$5.5 million in assets that New Jersey law enforcement seized during five months in 2016 alone.⁴⁵ In addition to that sum, New Jersey generated \$183 million from the Federal Equitable Sharing Program between 2000 and 2019.⁴⁶

Like the nationwide trend of biased policing-for-profit described above, asset seizures in New Jersey tend to occur in heavily policed, low-income communities.⁴⁷ As a result, the targets of asset seizures often lack the robust resources necessary to effectively respond to pending forfeiture proceedings and to retrieve their property. First, the up-front expenses, including hiring a private attorney and paying court filing fees, are cost prohibitive.⁴⁸ Further, the Committee heard testimony that prosecutors' offices will lump assets from people who have no relation whatsoever to each other to get the proceeding into a court that requires a larger filing fee.⁴⁹ These elements explain why claimants challenge forfeitures in only 3% of asset seizures in New Jersey.⁵⁰

Indeed, the Committee heard powerful testimony during its public hearing that illustrated precisely this problem. In 2017, police executed a search warrant for the basement apartment in a multi-family house.⁵¹ Taikeemah Neal's father lived in the building but not in the apartment listed on the search warrant.⁵² He had kept his life savings in cash at his home, and when he came home and saw the police, he wanted to do the right thing and proceeded to give the police \$13,000.⁵³ He was not a suspect and the warrant was not for his apartment, but the police claimed the cash was evidence to support drug charges and seized it.⁵⁴

⁴⁴ Ibid., 120.

⁴⁵ *Private Property, Police Profit: Explaining and Reforming Civil Asset Forfeiture in New Jersey*, ACLU-NJ (2018), at: https://www.aclu-nj.org/files/2215/4453/4434/2018_ACLU_Civil_Asset_Forfeiture.pdf.

⁴⁶ Ibid.

⁴⁷ Alex Shalom, testimony, *Nov. 19, 2020, Virtual*, transcript, p. 5 (hereafter *Nov. 19, 2020, Virtual Panel*).

⁴⁸ Ibid., 6.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Taikeemah Neal, testimony, *Nov. 19, 2020, Virtual Panel*, transcript, pp. 8-9.

⁵² Ibid. The warrant described young men participating in drug sales; Ms. Neal's father was 75 or 76 years old at the time of the search.

⁵³ Ibid.

⁵⁴ Ibid.

Later, Ms. Neal received a letter regarding the seizure, although it did not help her to understand the situation or her rights. Ms. Neal went to speak to her father's public defender who was unable to help but referred her to the ACLU of New Jersey.⁵⁵ With the help of attorneys from ACLU-NJ, Ms. Neal tracked down every receipt related to her father's money between 2002-2017 to prove that the money was not connected to a crime.⁵⁶ Even after the drug charges against Ms. Neal's father were dismissed, the state continued to fight Ms. Neal in her attempt to get her father's money back.⁵⁷ This progressed for two years; in the interim, Ms. Neal's father passed away.⁵⁸

Ms. Neal's story encapsulates many of the injustices associated with asset forfeiture. While her father was afforded representation on the criminal charges later dismissed, the state did not provide a lawyer for the civil case regarding the asset forfeiture. By happenstance, Ms. Neal connected with the ACLU-NJ and became one of the 3% of claimants to challenge an asset forfeiture. Still, the state battled Ms. Neal for two years to retain title to the cash, even though the criminal charges had been dropped.

In 2019, New Jersey amended its forfeiture laws to prohibit forfeiture if the "criminal charges [or prosecution] . . . arising out of or related to the property seizure terminates with no criminal culpability."⁵⁹ Notably, there are two exceptions to this prohibition that allow forfeiture to proceed absent a criminal conviction. The first exception applies when "there is no known owner of the seized property and no person credibly asserts an ownership interest in the seized property."⁶⁰ The second requires the state to "establish by a preponderance of the evidence, . . . that the property in the form of cash, . . . or other cash equivalents, . . . has a value of greater than \$1,000, . . . [or] property other than cash, . . . or cash equivalent, . . . has a value greater than \$10,000."⁶¹ Thus, while this provision improved the forfeiture framework in New Jersey, it left in place what the Institute for Justice deems a "weak conviction provision" and earned the state a "C+" from the organization in this regard.⁶² The same report also gave New Jersey an "F" for its "innocent owner burden" which is placed on the owner instead of the government.⁶³

⁵⁵ Ibid, 9. As Ms. Neal's father faced criminal charges, the court never told her father's public defender that a civil asset forfeiture action was pending against him.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ See 2019 N.J. Sess. Law Serv. Ch. 371 (Assembly 4970) (WEST) (amending N.J.S.A. 2C:64-3 by, inter alia, adding subsection k).

⁶⁰ N.J. Rev. Stat § 2C:64-3(k)(1).

⁶¹ N.J. Rev. Stat § 2C:64-3(k)(2).

⁶² Knepper et. al., *supra* note 1, at 167.

⁶³ Ibid., 168.

Most of the testimony, which will be further summarized below, focused on civil asset forfeiture as opposed to criminal forfeiture. While criminal asset forfeiture also brings some of the same problems, it does at least provide the defendant with due process supports such as legal representation. Witnesses shared that criminal asset forfeiture is the preferred method for forfeiture if the practice must continue. That said, at least one witness, Acting Gloucester County Prosecutor Christine Hoffman, noted that criminal asset forfeiture “is not the typical process in New Jersey because of the structure of our criminal statutes,”⁶⁴ and that civil asset forfeiture proceedings are “the overwhelming majority of forfeitures in New Jersey.”⁶⁵

III. Summary of Testimony

The Committee held virtual public panel presentations on September 21, 2020, November 17, 2020, and November 19, 2020, during which it received testimony from individuals impacted by asset forfeiture, as well as advocates, attorneys, scholars, and government officials. Their testimony covered a broad range of subjects and all offered their informed perspectives related to asset forfeiture. The edited transcripts of each panel presentation are available at:

https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L05KL0ZvcmZlaXR1cmU%3D

A. Purpose of Asset Forfeiture

Deterrence and Restitution

Christine Hoffman, the Acting Gloucester County Prosecutor, began her testimony by reiterating the goals of asset forfeiture, including restitution, which she cited as a particularly important goal, even though restitution is generally handled at the state or federal level during the course of criminal sentencing. She also noted that there are strict state policies that bind how law enforcement may use the proceeds from asset forfeiture and mainly allow for use on specialized equipment and specialized training. For example, forfeiture funds have been used recently in gun buy-back programs and purchasing body-worn cameras.⁶⁶ She also noted that default judgments can be vacated for up to a year and that the state typically holds onto any assets for that period before they use the asset.⁶⁷

Shirley Emehelu, former United States Assistant Attorney, who was in charge of Asset Forfeiture in the District of New Jersey, currently an attorney with Chiesa Shahinian & Giantomasi PC, began her comments by describing the purpose of asset forfeiture on the federal level, including deterring criminal activity and punishing those who have already committed crimes, but she focused her attention on the goal of victim compensation. According to Ms. Emehelu, “on the asset forfeiture

⁶⁴ Christine Hoffman, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 9.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, 7.

⁶⁷ *Ibid.*, 12.

side, law enforcement has various tools... for identifying, seizing, and preserving the value of assets which later through a legal process can be used to fund victim compensation.”⁶⁸

Vincent J. Sanzone, a New Jersey based criminal defense attorney with extensive experience in asset forfeiture cases, began his testimony by describing the purposes of asset forfeiture, mainly that it deters criminal activity and “take[s] away the illegal gains and profits from individuals engaged in crimes.”⁶⁹ However, he noted that “the problem with the current civil forfeiture proceeding in our state is that law enforcement agencies, the local cities and towns in which their police forces are making the arrests, are using the forfeiture laws to generate revenue.”⁷⁰ This “perverse financial incentive” has led to law enforcement in New Jersey abusing the system.⁷¹

B. Issues with Asset Forfeiture Generally

Revenue Incentive

Alex Shalom, a Senior Supervising Attorney and Director of Supreme Court Advocacy at the ACLU of New Jersey, began his testimony by acknowledging the theoretical goals of asset forfeiture, but stated that “in reality, civil asset forfeiture grants law enforcement authorities effective impunity to steal from the public and enrich their department.”⁷² To avoid this profit incentive, Mr. Shalom recommends that “law enforcement should not directly profit from civil asset forfeiture.”⁷³ Instead, the profits should be “deposited in the State General Fund rather than funneled back into the coffers of the initiating agency or department.”⁷⁴

Greg Glod, a Senior Criminal Justice Fellow with Americans for Prosperity, spoke at length about the perverse incentive inherent in asset forfeiture practice, where police departments depend on the revenue brought in by asset forfeiture to run the department. Mr. Glod specifically noted that in New Jersey, law enforcement agencies are able to “keep up to 100% of the profits from a forfeiture”.⁷⁵ Once departments become dependent upon the revenue from asset forfeiture to fund their operations, they become more likely to spend significant law enforcement resources on asset forfeiture as opposed to other aspects of the police work more directly related to public safety.⁷⁶

⁶⁸ Shirley Emehelu, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 15.

⁶⁹ Vincent J. Sanzone, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 4.

⁷⁰ *Ibid.*, 5.

⁷¹ *Ibid.*, 4-5.

⁷² Alex Shalom, testimony, *Nov. 19, 2020, Virtual Panel*, transcript, p. 7.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Greg Glod, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 4.

⁷⁶ *Ibid.*

According to Mr. Glod, law enforcement would be less likely to pursue forfeiture as much if this profit incentive did not exist, although others believe that it is a useful and necessary tool in the war on drugs and helpful in obtaining pleas.⁷⁷ Mr. Glod also mentioned the reforms occurring in other states, such as Texas, where a portion of the revenue from asset forfeitures is used to fund victim compensation, public schools, and other community services.⁷⁸ While this can be a better use for the funds than using them as a part of law enforcement budgets, he warned that deploying the funds for other, “more sympathetic” causes may make it more difficult to reform or abolish the practice.⁷⁹

Nathan Wong Link, a Criminologist and Associate professor in the Department of Sociology, Anthropology, and Criminal Justice at Rutgers University, also mentioned a study that used data from 90,000 local governments and found that “police departments in cities that collect a greater proportion of their revenue from fines, fees, and forfeitures solve crimes at significantly lower rates,”⁸⁰ which suggests that “when police are incentivized by financial considerations, they may respond in a rational manner by spending time on those revenue raising activities at the expense of critical law enforcement responsibilities.”⁸¹

John Koufos, the National Director of Reentry Initiatives at Right on Crime, spoke against the profit incentive inherent in asset forfeiture proceedings, but also cautioned that rerouting the money to other, more useful causes may just further legitimize the practice. As examples, he cited Indiana and Missouri as states that “push the funds towards public education.”⁸² In these cases, now advocates must argue against law enforcement and teachers’ unions to prohibit the practice of asset forfeiture. Mr. Koufos recommended that none of the money from asset forfeiture go towards law enforcement purposes, and instead go into “ancillary services, such as mental health treatment, addiction treatment, [and] housing solutions...”⁸³

Impact on Low-Income Individuals

Alex Shalom also discussed how asset forfeiture disproportionately impacts low-income communities and communities of color, with eight of the ten cities with the highest frequency of seizures in NJ being among the poorest in the state. Individuals challenge these cases just 3% of the time. The other 97% of cases are resolved by a default judgment.⁸⁴ This has set up a system

⁷⁷ Ibid., 18.

⁷⁸ Ibid., 4.

⁷⁹ Ibid., 25. 7/20:

⁸⁰ Nathan Wong Link, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 10.

⁸¹ Ibid.

⁸² John Koufos, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 20.

⁸³ Ibid., 28.

⁸⁴ Alex Shalom, testimony, *Nov. 19, 2020, Virtual Panel*, transcript, p. 5.

where law enforcement can bring these cases with no fear of ever having to defend the forfeiture. Lack of representation is a major aspect of this issue: low-income individuals cannot afford representation and Public Defenders and most legal services providers do not offer representation, especially in civil asset forfeiture proceedings.⁸⁵ Beyond lack of representation, the other costs associated with lawsuits, such as filing fees, can be cost prohibitive as well. Mr. Shalom shared one specific experience with a client who had \$171 seized from him but had to pay a \$175 filing fee just to have the opportunity to request his money back.⁸⁶

Vincent J. Sanzone also discussed the fact that neither the Office of the Public Defender nor Legal Services assist individuals in asset forfeiture proceedings, which makes it extremely difficult for individuals to find representation and avoid a default judgment. Low-income individuals are most negatively impacted by asset forfeiture, which is counter to the stated purpose of the practice being focused on stopping large drug enterprises. Mr. Sanzone spoke about how most asset forfeitures are valued at under \$1000 and how these low-level forfeitures are not worth the cost of hiring an attorney and fighting the lawsuit.⁸⁷ Since it is not worth the cost, most of these cases end in default judgments.

Prevalence in African American Communities

Greg Glod also spoke about the prevalence of asset forfeiture being pursued against communities of color, specifically Black men. He specifically cited a study out of South Carolina that showed that although Black men only make up 13% of the population, they account for 65% of all forfeitures, and mentioned that numbers out of Philadelphia and Dallas show a similar trend.⁸⁸

Nathan Wong Link also spoke about the intersection of asset forfeiture and race. According to Mr. Link, “given their representation in the criminal justice system, Blacks and Hispanics and their families are more deeply impacted by America’s heavy reliance on monetary sanctions and forfeitures.”⁸⁹ Studies have found that “Blacks and Hispanics are assessed greater amounts of fines and fees compared to whites,” and that the fines and fees “have long-term adverse impact among people of color who may face difficulties with repayments.”⁹⁰ Mr. Link also cited a study that found “that cities that rely more on revenue from fines are generally the cities that have larger proportions of African American residents”, but that the effect can be “mitigated, but not completely diminished within cities that have Black representation on city councils.”⁹¹

⁸⁵ Ibid.

⁸⁶ Ibid., 5-6.

⁸⁷ Sanzone, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, pp. 5-6.

⁸⁸ Greg Glod, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 5.

⁸⁹ Nathan Wong Link, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 9.

⁹⁰ Ibid., 9-10.

⁹¹ Ibid., 10.

Consequences of Forfeiture

Nathan Wong Link focused most of his comments on the impact that financial obligations, such as forfeiture, can have on individuals and their families in both the short and long-term. According to Mr. Link, “financial obligations are a source of stress that exacerbate the already tumultuous prison reentry transition.”⁹² Financial obligations “can cause people to forgo basic necessities, such as food, shelter, childcare needs, and medicine”, and may “trigger substance abuse and other mental health issues.”⁹³ These issues are further exacerbated by the barriers individuals face in attempting to obtain employment following reentry. Financial obligations also “cause strain between family members”, who often take on some of the burden to avoid seeing their loved one reincarcerated or further impacted by the criminal legal system.⁹⁴ It is usually women who bear the burden of helping their family members with legal financial obligations. Strained family relationships can lead to substance abuse and recidivism. These potential consequences are all related to an individuals’ inability to pay the fine, fee, or forfeiture assessed by the court, and demonstrate some of the potential harm individuals may face unless states proactively seek to avoid placing individuals in such situations. To that end, Mr. Link recommends that courts expand their use of ability-to-pay assessments, which should be reassessed periodically as financial circumstances change.⁹⁵

Taikeemah Neal, a NJ resident who has experienced the impact of asset forfeiture, shared her experiences with the Committee, which are summarized in detail above. After the police seized her father’s life savings, thirteen thousand dollars, he had saved to cover his burial costs based on a search warrant for different room in a multi-family house, it took years to eventually receive the money that had been seized from her. By that time, her father had passed, and she did not have the money to provide the burial that he had saved for. She was only able to receive legal representation through the ACLU-NJ, which had a legal fellow working on asset forfeiture cases at the time. The entire ordeal placed undue and immeasurable financial strain and emotional stress on Ms. Neal.

Greg Glod also spoke about how having assets seized or forfeited can make reentry exponentially more difficult. For example, if an individual has their car seized, then he or she may have to pay impound fees to have the car returned. Until those fees are paid, a car will not be available, thus making access to gainful employment problems, which is directly related to chance of recidivism.⁹⁶ If they’ve had their vehicle forfeited, they will likely not get it back, which will make obtaining gainful employment much more difficult.

⁹² Ibid., 7.

⁹³ Ibid., 7-8.

⁹⁴ Ibid., 8.

⁹⁵ *Link prepared memo, supra* note 26, at 7.

⁹⁶ Greg Glod, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 14.

C. Issues with Civil Asset Forfeiture

Lack of Due Process Protections

Greg Glod discussed the fact that many advocates across the country are pushing for an end to the practice of civil asset forfeiture due to the lack of due process protections in civil actions, advocating for “robust due process protections there, particularly [at the] pre-trial stage” while the practice still exists.⁹⁷ Lack of legal representation is the main due process concern, and accounts for why many prefer criminal asset forfeiture as a process.

Christine Hoffman shared the concern raised by other individuals regarding the lack of representation in asset forfeiture proceedings and noted that the lowest income individuals are practically never represented. Ms. Hoffman noted that the Office of the Public Defender does not provide representation in these proceedings, and as a prosecutor, expressed her wish that it would.⁹⁸

Legal Burden

Christine Hoffman discussed the common defenses available in asset forfeiture proceedings, which are the innocent owner and legitimate income defenses, which the individual seeking to recover their property must prove, and how these defenses can make it costly for the government to proceed with civil forfeiture cases.⁹⁹

Greg Glod spoke about the burden placed on individuals attempting to recover their property, where they must prove that the property was not linked to criminal activity. According to Mr. Glod, the burden should be on the government to prove the link to criminal activity.

Vincent J. Sanzone also spoke to the burden imposed upon individuals who must prove that their assets or cash were obtained legally, a burden which is often very difficult for individuals to bear, especially because they most likely cannot afford to obtain asset forfeiture counsel. In many cases, defendants choose to surrender the property by default because they do not have the resources necessary to fight the lawsuit, and instead choose to focus on defending the criminal case.¹⁰⁰

Alex Shalom also spoke about the burdens on both parties in forfeiture proceedings. The government simply needs to “prove by a preponderance of the evidence that it is more likely than not that the assets linked to criminal activities in order to permanently seize them.”¹⁰¹ On the other

⁹⁷ Ibid., 16.

⁹⁸ Christine Hoffman, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 14.

⁹⁹ Ibid., 11, 12, 28.

¹⁰⁰ Sanzone, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 6.

¹⁰¹ Alex Shalom, testimony, *Nov. 19, 2020, Virtual Panel*, transcript, p. 8.

hand, individuals who have had their assets seized must “justify every cent in their name” and prove that “their money is not connected to crime”.¹⁰²

Difficulty Defending Case

Greg Glod discussed the difficulties that those who have their assets seized face in attempting to defend their criminal case at the same time. Often, individuals will have their homes, cars, and cash seized, and sometimes even have their bank accounts frozen. When individuals no longer have access to their assets, they do not have the financial ability to hire an attorney of their choice, which is a vital aspect of the successful defense of any case. This gives the government much more leverage than it would otherwise have, and often leads to individuals agreeing to plea deals that they would otherwise reject.¹⁰³

Vincent J. Sanzone discussed the unfair leverage that asset forfeiture gives the prosecution. Often, “the county prosecutor will (without admitting it) condition the plea on the defendant forfeiting the US currency in his or her possession at the time of the arrest a condition of the plea.”¹⁰⁴ According to Mr. Sanzone, “when a defendant is faced with going to jail or receiving a harsh sentence, the defendant will undoubtedly and, in almost every case, willingly forfeit what the county prosecutor wants forfeited.”¹⁰⁵

D. Recent Reforms

Other States

Greg Glod also discussed recent reforms in the asset forfeiture realm. Only these states, North Carolina,¹⁰⁶ New Mexico,¹⁰⁷ Nebraska¹⁰⁸ and Maine,¹⁰⁹ have prohibited civil asset forfeiture in favor of criminal asset forfeiture only; these states are considered the gold standard for asset forfeiture reform.¹¹⁰ Sixteen states “require a conviction in criminal court before civil forfeiture proceedings can occur.”¹¹¹ Maine was the most recent state to make this change, which it did in

¹⁰² Ibid.

¹⁰³ Greg Glod, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 13.

¹⁰⁴ Vincent J. Sanzone, testimony, *Nov. 17, 2020, Virtual Panel*, transcript, p. 6.

¹⁰⁵ Ibid.

¹⁰⁶ N.C. Gen. Stat. § 90-112 (1985).

¹⁰⁷ N.M. Stat. Ann. § Ch. 31, art. 27, (2021).

¹⁰⁸ Neb. Rev. Stat. § 25-21,302 (2021).

¹⁰⁹ 2021 Me. Legis. Serv. Ch. 454 (H.P. 1125) (L.D. 1521) (West) (*rev’g* Me. Rev. Stat. Ann. tit. 15, § 5826).

¹¹⁰ Greg Glod, testimony, *Sept. 21, 2020, Virtual Briefing*, p. 29.

¹¹¹ Ibid.

2021.¹¹² Nine states and D.C. have taken steps to limit cooperation with the Federal Government through the Equitable Sharing Program.¹¹³ Arizona,¹¹⁴ Maryland,¹¹⁵ Nebraska,¹¹⁶ New Mexico¹¹⁷ and Ohio¹¹⁸ have prohibited local agencies from transferring property to the federal government unless the property is valued above more than a specified threshold amount. California¹¹⁹ and Colorado¹²⁰ prohibit local agencies from receiving their financial cut of the proceeds unless the property is worth more than the specified threshold amount. Wisconsin prohibits local agencies from receiving proceeds from the program unless there is a criminal conviction that led to the seizure.¹²¹ Pennsylvania¹²² and D.C.¹²³ prohibit local agencies from turning over locally seized property to the federal government, but this specific prohibition is unlikely to truly impact equitable sharing as there are a number of other ways for equitable sharing to occur.¹²⁴

Nathan Wong Link provided testimony regarding Massachusetts' creation of a Financial Sanctions Commission which was created by the legislature to take an inventory of the legal financial obligations owed by residents of the state. According to Mr. Link, such a Commission is useful to illustrate the scale of asset forfeiture, and the application of other legal financial obligations, and as a potential tool for reform locally. Without such a dedicated body, it will be difficult to really assess the scope of the issue.¹²⁵

¹¹² *Supra*, note 109.

¹¹³ Knepper et. al., *supra* note 1, at 49.

¹¹⁴ 2021 Ariz. Legis. Serv. Ch. 327 (H.B. 2810) (WEST).

¹¹⁵ H.B. 336, 2016 Leg., Reg. Sess. (Md. 2016).

¹¹⁶ *Supra*, note 105.

¹¹⁷ *Supra*, note 104.

¹¹⁸ Ohio Rev. Code Ann. § 2981.14 (West).

¹¹⁹ Cal. Health & Safety Code § 11488.4 (West).

¹²⁰ Colo. Rev. Stat. Ann. § 16-13-504.5 (West).

¹²¹ Wis. Stat. Ann. § 961.55 (West).

¹²² 42 Pa. Stat. and Cons. Stat. Ann. § 5807.1 (West).

¹²³ D.C. Code Ann. § 41-311 (West).

¹²⁴ Knepper et. al., *supra* note 1, at 49-50.

¹²⁵ Nathan Wong Link, testimony, *Sept. 21, 2020, Virtual Panel*, transcript, p. 29.

New Jersey

John Koufos provided testimony regarding recent (2020) legislation in New Jersey. One bill, S1963 mandated comprehensive disclosure and transparency requirements by requiring county prosecutors to compile and submit reports concerning asset seizure and forfeiture to the Attorney General on a quarterly basis. Another bill, A4970 revised the procedures for certain asset forfeiture proceedings and required a criminal conviction before civil forfeiture except in specific cases.¹²⁶ These bills, which were signed into law by Governor Murphy on January 13, 2020, and January 20, 2020, respectively, provide some additional oversight of asset forfeiture, though they do not fundamentally change the practice.

IV. Findings and Recommendations

The Committee believes that numerous issues plague asset forfeiture practices, which combine to create a system that is ripe for abuse by law enforcement and result in individuals, mainly from communities of color and low-income communities, having their assets seized and forfeited by the government, often wrongfully. The revenue incentive for law enforcement makes bolstering their budget a top priority, often at the expense of fairness, and even, as set forth above, public safety.

Among their duties, advisory committees to the Commission are authorized to: (1) advise the Commission concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the federal government with respect to equal protection of the laws; and (2) initiate and forward advice and recommendations to the Commission upon matters that the Advisory Committee has examined.¹²⁷ Based upon its research and the testimony it received on this topic, the New Jersey Advisory Committee submits the following findings and recommendations for the Commission's consideration.

Finding 1: Profit Incentive

Police departments are entitled to keep up to 100% of the profits from asset forfeitures. This creates a perverse profit incentive that leads to law enforcement prioritizing asset forfeiture to bring in revenue and support the local budget instead of prioritizing police functions, and the exercise of prosecutorial discretion, both of which do or should relate to public safety, for example. Despite the goal of bringing in revenue, most cases where assets are forfeited are of value less than \$1000.

Recommendation 1: Require Profits Go to General Fund

The Committee recommends that NJ eliminate the incentive to over-police by requiring profits from asset forfeiture to go into a general fund, with 0% of the funds earmarked for policing

¹²⁶ *Koufos prepared memo, supra* note 6, at 9.

¹²⁷ 45 C.F.R. § 703.2 (2018).

purposes;¹²⁸ alternatively, NJ could consider putting a cap (*e.g.*, 10-25%) on the funds that can go to law enforcement, and call for the remaining profits to be distributed, for example, to a victim compensation fund, thus targeting a particular purpose of forfeiture. Other states have made the decision to reroute the profits to different purposes, such as public education and victim compensation, but the Committee heard testimony recommending caution in dividing funds in this manner, since, if any will be viewed as favorable to police causes, they may be legitimized by the fact that some funds support other causes. Another potential alternative could be to prohibit law enforcement from receiving any percentage of the profit unless the forfeiture clears a high monetary threshold (*e.g.*, \$50,000-\$100,000). Such an approach could tie the profit incentive to the types of crimes the practice of asset forfeiture is supposed to target and deter. This recommendation should also be applied more broadly to the fines and fees context, where the same perverse financial incentives often exist.¹²⁹

Finding 2: Default Judgments

The Committee heard significant testimony on the prevalence of asset forfeitures ending in default judgments. For example, in 2016, 97% of asset forfeitures were resolved by default judgments, where individuals did not even attempt to get their assets back. One of the main reasons for this trend is that the average value of assets forfeited are less than \$1,000. In these cases, fighting a lawsuit is often not worth the value of the assets, especially when individuals are also trying to defend the related criminal case.

Recommendation 2: Right to Counsel

To specifically address the issue of default judgments, the New Jersey legislature should provide for legal representation in all asset forfeiture proceedings. Providing counsel in these proceedings will greatly decrease the default rate, particularly because the Office of the Public Defender and most legal service providers do not provide representation for asset forfeiture proceedings.¹³⁰

Finding 3: Improper Burdens

The Committee heard substantial testimony with regard to the relative legal burdens placed on the government and the individual attempting to receive seized assets. Most importantly, the state has a very low burden while the individual has a very high burden that will be difficult to meet in most cases. Generally speaking, in criminal cases the prosecution must bear the burden of proof prove beyond a reasonable doubt. However, in civil asset forfeiture proceedings, the prosecution need only prove by a preponderance of the evidence that it is more likely than not that the assets are linked to criminal activities. Once that low burden is met, the individual is required to demonstrate

¹²⁸ Alex Shalom, testimony, *Nov. 19, 2020, Virtual Panel*, transcript, p. 7. *See also* Koufos prepared memo, *supra* note 6, at 9 (“Change the ways seized funds are allocated and not allow[] law enforcement to obtain 100 percent of the proceeds. For instance, move some funds from drug offense proceeds to other areas that actually promote public safety such as substance abuse programs, diversion programs, and supportive housing.”).

¹²⁹ Link prepared memo, *supra* note 26, at 7.

¹³⁰ Alex Shalom, testimony, *Nov. 19, 2020, Virtual Panel*, transcript, p. 5.

that the asset at issue was obtained through legal means, which can be quite difficult, particularly but not only for an unrepresented individual.

Recommendation 3: Increase Government Burden

Based on the great deal of testimony that the Committee heard on this issue, the Committee recommends raising the burden on the prosecution to match the criminal burden of proof beyond a reasonable doubt.¹³¹ The current use of the preponderance of the evidence standard allows broad discretion to law enforcement and prosecutors to seize assets and subject them to forfeiture proceedings. The Committee further recommends that the burden as it relates to the innocent owner defense be placed on the government, and not on the individual.¹³²

Finding 4: Federal Equitable Sharing Program

Asset forfeiture proceedings extend beyond the state: the Federal government also plays a substantial role, mainly through the Federal Equitable Sharing Program, which allows local law enforcement to cooperate with federal law enforcement in asset forfeiture proceedings and receive a percentage of the profit depending on the two entities relative roles in the case. This program is a barrier to many state-level reforms, especially insofar as individuals of any given state are still subject to federal asset forfeiture proceedings despite expanded protections in their state.

Recommendation 4: End Participation in Federal Equitable Sharing Program

The Committee recommends that NJ end its participation in the Federal Equitable Sharing Program, which provides yet another incentive for law enforcement agencies to utilize resources to seize and forfeit assets from individuals in order to bolster their own budget. Prohibiting participation in this program will also allow for state level reforms to have a broader impact.

Finding 5: Lack of Criminal Convictions

One issue that seems to be extremely prevalent, on a national basis, is that governments seize and forfeit assets from individuals who do not have a criminal conviction for the underlying crime that resulted in seized assets. Fortunately, New Jersey has partially addressed this issue in recent legislation that requires a criminal conviction for seized property other than *prima facie* contraband to be subject to forfeiture unless there is no claim for the seized property, the property is cash or cash equivalent and is greater than \$1,000, or the seized property other than cash or cash equivalents is valued at greater than \$10,000, in which case a criminal conviction is not required.¹³³ These exceptions, however, are significant and in many cases gobble up the rule.

¹³¹ Ibid., 7; Koufos *prepared memo*, *supra* note 6, at 9.

¹³² *Supra*, note 1, at 168.

¹³³ *Supra*, note 60-61.

Recommendation 5: Require A Criminal Conviction in All Asset Forfeiture Cases

While less systemic reforms are helpful, the State should go further by removing any exceptions and requiring a criminal conviction in all cases. As the law currently stands, the protections put in place are amongst the weakest of the states that have attempted to require a criminal conviction prior to forfeiture. And the low value thresholds will still result in many individuals having their assets wrongfully seized.

Finding 6: Due Process Concerns in Civil Asset Forfeiture

Civil asset forfeiture, as opposed to criminal asset forfeiture, raised many due process concerns. The most impactful of these due process concerns is the lack of appointed representation in civil cases. Often, individuals are provided with representation to defend their criminal case but are not given any support as it relates to defending the civil forfeiture suit. This lack of representation, paired with the inability to call witnesses, put individuals at a severe disadvantage when their forfeiture proceedings are civil as opposed to criminal.

Recommendation 6: End the use of civil asset forfeiture

The Committee recommends that New Jersey follow the lead of North Carolina,¹³⁴ New Mexico,¹³⁵ Nebraska¹³⁶ and Maine¹³⁷ and abolish the practice of civil asset forfeiture in favor of criminal asset forfeiture. Limiting asset forfeitures to the criminal sphere addresses most of the concerns raised regarding the lack of due process protections in the civil asset forfeiture and would further address the issues of high default rates in asset forfeiture proceedings.

Finding 7: Lack of Research

The Committee heard testimony from multiple witnesses regarding the lack of research into how asset forfeiture impacts individuals, both across the country and here in New Jersey. Lacking such baseline research, especially research outlining the existing racial disparities, it is difficult to ascertain the full extent of the problem, although the existence of these problems is clear, as a result of existing research and anecdotal accounts.

Recommendation 7: Establish Legal Financial Obligations Commission

The Committee recommends that NJ establish a Legal Financial Obligations Commission, of the sort that was developed in Massachusetts,¹³⁸ and task it with taking an inventory of all fees, costs,

¹³⁴ *Supra*, note 103.

¹³⁵ *Supra*, note 104.

¹³⁶ *Supra*, note 105.

¹³⁷ *Supra*, note 111.

¹³⁸ 2010 Mass. Legis. Serv. Ch. 131 (H.B. 4800) (WEST) (§ 177: creating a special commission to study the feasibility of establishing inmate fees).

finer, and forfeitures in NJ.¹³⁹ This first step will provide much of the data necessary for NJ to make informed decisions with regard to asset forfeiture in particular and fines and fees more generally, with an eye toward reform and toward assuring that forfeiture, like other fines and fees, does not act as an obstacle to the successful reentry of formerly incarcerated individuals into society, increasing recidivism. This Commission should weigh in on policy reform efforts locally and make recommendations on reforms regarding fines, fees, and forfeitures that have occurred in other states, including the implementation of ability-to-pay assessments in all proceedings, the removal of driver's license suspensions for the failure to pay fines or fees, and other reforms which the Committee commends to such a Commission or other policymakers.¹⁴⁰ Finally, this Commission should focus on collecting data and recommendations related to racial disparities in the asset forfeiture context.

V. Conclusion

Reforming the practice of asset forfeiture in New Jersey is an important undertaking that will have a broad positive impact on individuals across the state, especially those from low-income communities or communities of color. While there are legitimate purposes for the government to utilize asset forfeiture, as currently utilized it does not accomplish the stated goals of deterring large drug enterprises or depriving them of their unlawful profits. The Committee accordingly recommends significant reforms to asset forfeiture law, to:

- assure that forfeiture actions, whether criminal or civil, are always accompanied by appropriate due process protections and the assistance of counsel;
- remove or reduce the incentives provided to law enforcement to use forfeiture to raise revenue for itself or to inappropriately use forfeiture to provide leverage in plea bargaining; and
- remove obstacles that forfeiture—like other fines, costs and fees—pose for the successful reentry of formerly incarcerated individuals into society, after serving their sentences.

¹³⁹ *Link prepared memo, supra* note 26, at 7.

¹⁴⁰ *Ibid.*; National Effort to Reform Harmful Fines and Fees Announces Local Champions, FINES AND FEES JUSTICE CENTER (May 26, 2020), at: <https://finesandfeesjusticecenter.org/2020/05/26/national-effort-to-reform-harmful-fines-and-fees-announces-local-champions/>.



**New Jersey Advisory Committee
U.S. Commission on Civil Rights**

**Civil Rights Impacts of Criminal Records
on Criminal Asset Forfeitures**

Tuesday, November 17, 2020; 1:00 pm to 3:00 pm

Agenda

Welcome

- Lawrence A. Lustberg, Chair, New Jersey Advisory Committee

Virtual Overview Panel Presentation of National Experts

- Greg Glod, Criminal Justice Fellow
Americans for Prosperity
Alexandria, VA
- Nathan Wong Link, PhD, Associate Professor
Rutgers University, Department of Sociology
Anthropology & Criminal Justice
Camden, NJ
- John Koufos, National Director
Reentry Initiatives at Right on Crime
Texas Policy Foundation
Austin, TX

Open Comments from the Public

Closing Remarks & Adjourn



**New Jersey Advisory Committee
U.S. Commission on Civil Rights**

**A Virtual Briefing: Legal Process of
Asset Forfeitures in New Jersey**

Tuesday, November 17, 2020; 2:15 pm to 4:15 pm (ET)

Agenda

Welcome

- **Lawrence A. Lustberg, Chair, New Jersey Advisory Committee**

Panel Presentation by New Jersey Experts

- **Christine Hoffman, Acting Gloucester County Prosecutor,
Woodbury, NJ**
- **Shirley Emehelu, Esq.,
Chiesa Shahinian & Giantomasi PC
West Orange, NJ**
- **Vincent J. Sanzone, Jr., Esq.
Law Office of Vincent J. Sanzone, Jr.
Elizabeth, NJ**

Comments from the Public

Closing Remarks & Adjourn



**New Jersey Advisory Committee
United States Commission on Civil Rights**

**Briefing: Testimonials About Asset Forfeitures
&
Access to Occupational Licenses in NJ**
Thursday, November 19, 2020; 2:15 pm to 4:15 pm

Agenda

Welcome

- Lawrence A. Lustberg, Chair
New Jersey Advisory Committee

Virtual Panel Presentation by New Jersey Experts

- Alexander Shalom, Senior Supervising Attorney
ACLU of New Jersey
Newark, NJ
- Taikeemah Neal, Resident
Newark, NJ
- Edwin Ortiz, Returning Citizen
Newark, NJ

Comments from the Public

Closing Remarks & Adjourn

**Statement of Shirley Emehelu, Former Chief of Asset Forfeiture
for the U.S. Attorney's New Jersey Office**

I. Preliminary Statement

As an initial matter, I would like to delineate the lens through which I am offering my testimony today. Although I have returned to private practice as a Member of Chiesa Shahinian & Giantomasi PC's White Collar Defense/Investigations Group and as the Co-Head of the firm's Banking and Finance Group, my testimony today is based on the knowledge and experience of the federal criminal forfeiture process that I gleaned as Chief of Asset Forfeiture and Anti-Money Laundering for the U.S. Attorney's Office for the District of New Jersey and from almost a decade of investigating and prosecuting complex financial fraud cases. That being said, this written statement and my testimony today are based on my personal views and assessments and should not be attributed to the U.S. Department of Justice writ large or the New Jersey U.S. Attorney's Office.

II. Background

A. Goals of Asset Forfeiture

From a law enforcement perspective, asset forfeiture plays a critical role in combatting criminal activity. Asset forfeiture serves a punitive function, punishing criminals by depriving them of the property that was used to commit criminal activity and/or the property that was obtained from criminal activity. In addition, asset forfeiture is used to deter future criminal activity by depriving criminal actors of the fruits of their crime and to deter would-be criminals from engaging in criminal activity by taking the profit out of crime. Asset forfeiture also serves as a means to recover assets that may be used to compensate victims when authorized under federal law. Finally, asset forfeiture is utilized to disrupt criminal organizations and protect the community.

B. Predicates for Asset Forfeiture

There are four predicate requirements for asset forfeiture under federal law: (1) the asset type must fall within a forfeitable category; (2) there must be statutory authority for forfeiture set

forth under the United States Code; (3) there must be a permissible theory for forfeiture; and (4) there must be a factual nexus between the asset sought to be forfeited and the criminal violation. Each of these predicates is addressed in turn below.

1. *Forfeitable Asset*

A broad range of assets may be forfeited under federal law. Examples of forfeitable property include the following:

- Real Property: Homes, businesses, parcels of open space, minerals, and natural gas deposits.
- Tangible Personal Property: Cash, jewelry, art, antiques, firearms, cars, boats, and airplanes.
- Intangible Personal Property: Professional licenses, liquor licenses, website domain names, stocks, lottery winnings, appreciation of assets (e.g., increases in the value of paintings), lien interests, and virtual currency (e.g., Bitcoin).

2. *Statutory Authority for Forfeiture*

Forfeiture must be authorized by specific statute. Forfeiture is statutorily authorized for, *inter alia*, controlled substance offenses; money laundering, mail and wire fraud, and other financial crimes; organized crime/racketeering; structuring and other currency violations; terrorism/terrorism financing; and crimes listed as “specified unlawful activity” under 18 U.S.C. § 1956(c)(7), including a broad list of “racketeering activity” offenses under § 1961(1) such as federal bribery, economic espionage, sexual exploitation of children, securities fraud, and immigration fraud.

3. *Theories of Forfeiture*

Forfeiture must be tied not only with specific types of crimes, but also specific theories of forfeiture grounded in the applicable statute(s). There are five overarching theories of forfeiture depicted in the pyramid graphic below, with the breadth of potential forfeitures being broadest for terrorism offenses (the base of the pyramid) and the scope of forfeitures somewhat narrowed for RICO cases, and increasingly constricted for property “involved in” money laundering or

human trafficking, property used to “facilitate” a crime, and — the narrowest category — property constituting the proceeds of illegal activity:

Theories of Asset Forfeiture



(a) Proceeds Theory

Starting with the narrowest theory of forfeiture – the proceeds theory – Congress has authorized the forfeiture of the proceeds of numerous crimes, including fraud, bribery, embezzlement, and theft. *See, e.g.*, 18 U.S.C. § 981(a)(1)(C). “Proceeds” constitute any property, real or personal, or any interest in property that is traceable, directly or indirectly, to the illegal activity. Specifically, proceeds are any property that the wrongdoer would not have obtained or retained but for the crime. *See, e.g., U.S. v. David Nicoll (BLS)*, Crim. No. 13-385 (SRC), 2015 U.S. Dist. LEXIS 90455 (D.N.J. July 9, 2015) (concluding that the Government need not trace each dollar in the coffers of the defendant’s business to a criminal rather than a legitimate operation, where the Government had shown that “the very nucleus of [the] business model [was] rotten and malignant” and that its “entire operation was permeated with fraud.”). Generally, the Government is not limited to net proceeds, but may recover the gross proceeds of the offense without reduction for overhead expenses or start-up costs.

(b) Facilitation

Under the facilitation theory, the Government may forfeit assets that make a crime easier to commit or harder to detect, such as a drug stash house, a vehicle containing a trap used to transport/store narcotics, property used to reward minors who were submitted to sexual abuse

(see, e.g., *U.S. v. 2004 Blue Lexus GX470*, 2008 WL 2224308 (W.D. Wash. 2008)), and a physician's medical license used to distribute controlled substances by writing illegal prescriptions (see, e.g., *U.S. v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004)). The Government must prove by a preponderance of the evidence that there is a "substantial connection" between the property sought to be forfeited and the crime; and must show that this connection is more than incidental or fortuitous, though it need not be integral, essential, or indispensable.

(c) Money Laundering

The scope of potential forfeitures are broader in money laundering and human trafficking cases. Indeed, federal law authorizes the forfeiture of all property "involved in" a money laundering scheme or human trafficking crime committed commencing on or after May 29, 2015. Said property can include both "dirty" and "clean" funds – such as a bank account containing legitimately obtained funds and ill-gotten funds. The "dirty" funds, however, must be traceable to a financial transaction connected to the money laundering or human trafficking scheme.

A common form of money laundering is "concealment money laundering," which involves the movement of illicitly obtained funds to conceal the nature, location, source, ownership, or control of the funds. Alternatively, "promotion" money laundering involves reinvesting illegal funds in criminal activities. Property "involved in" or traceable to money laundering is potentially forfeitable.

(d) RICO

In RICO cases, the Government can forfeit property acquired or maintained through racketeering activity, and any interest that the defendant has in the racketeering enterprise itself, regardless of whether the asset or portion of the business was "tainted" by use in connection with the racketeering activity. See 18 U.S.C. § 1963(a).

(e) Terrorism

Finally, the Government has the broadest authority to forfeit property in terrorism cases. Indeed, the Government may seize and forfeit all assets of an individual engaged in planning or

perpetrating acts of domestic or international terrorism. *See* 18 U.S.C. § 981(a)(1)(G). This authority encompasses all assets, foreign or domestic, regardless of whether the property was involved in the terrorism activity or not and is designed to financially incapacitate the terrorist to prevent further acts of violence.

4. *Factual Nexus Between Property and the Crime*

The fourth and final predicate for forfeiture under federal law is establishing a factual nexus between the property and the crime. This predicate involves the most direct collaboration between the prosecutors and their law enforcement partners (whether from the FBI, DEA, ATF, IRS-Criminal Investigation, U.S. Postal Inspection Service, Secret Service, etc.). A thorough, pre-arrest investigation is critical in order to: identify assets and property for seizure and forfeiture before they are dissipated or transferred; obtain records related to the purchase, maintenance, and ownership of assets pre-indictment, while the Government still has grand jury subpoena power; and to use grand jury subpoenas to identify potential “substitute assets.”

Substitute assets are property of the defendant that may be forfeited in substitution for the directly forfeitable (i.e., “tainted”) property if certain criteria are met under 21 U.S.C. § 853(p) – namely, where, as a result of any act or omission of the defendant, the directly forfeitable property:

- (1) Cannot be located upon the exercise of due diligence;
- (2) Has been transferred or sold to, or deposited with, a third party;
- (3) Has been placed beyond the jurisdiction of the court;
- (4) Has been substantially diminished in value; or
- (5) Has been commingled with other property which cannot be divided without difficulty.

If these criteria are met, the Government may satisfy a forfeiture money judgment (discussed below) through the forfeiture of substitute assets pursuant to 21 U.S.C. § 853(p).

III. Pre-Seizure Planning/Pre-Trial Seizure/Restraint

A. Tracing

During the investigative stage of a criminal case, prior to arrest, forfeiture AUSAs working with their law enforcement partners and/or the criminal AUSA(s) engage in the process

of “tracing” to determine whether a particular asset was acquired with fraud proceeds. The Government bears the burden of tracing assets to the criminal offense by a preponderance of the evidence and may rely on circumstantial evidence to show that an asset was acquired with fraud proceeds. *See U.S. v. Green*, 516 Fed. Appx. 113, 135 (3rd Cir. 2013) (while there was no direct evidence that the defendant acquired a car with his fraud proceeds, the circumstantial evidence – e.g., that he purchased the car during the time he was committing the offense and had no other income – was sufficient).

In the Third Circuit, there is a heightened tracing requirement where “dirty” and “clean” money are commingled in a bank account, which may make it more difficult for the Government to forfeit funds in the account based on a money laundering theory. *See U.S. v. Voigt*, 89 F.3d 1050, 1088 (3d Cir. 1996) (holding that the Government cannot satisfy its tracing burden where criminal proceeds had been commingled with legitimate funds in a bank account and the allegedly traceable property was not purchased until there had been “numerous intervening deposits and withdrawals.”). Where dirty and clean funds are highly commingled, the Government can seek a forfeiture money judgment against the defendant for the amount of proceeds or money laundered, and satisfy the judgment by forfeiting substitute assets pursuant to 21 U.S.C. § 853(p).

B. Pre-Seizure Planning

In addition to tracing (if forfeiture is premised, for example, on a proceeds or money laundering theory), the U.S. Attorney’s Office, the seizing law enforcement agency, and the agency that will take custody of the asset pending final forfeiture – usually the U.S. Marshals Service (but in some category of cases, the U.S. Treasury Department) – engage in pre-seizure planning that includes the following:

- (1) Conducting a Net Equity Analysis to determine the fair market value of the property net of all liens, mortgages, and management and disposal costs;
- (2) Identifying any title/ownership issues that may delay or prevent the Government from disposing of an asset in a timely manner; and

- (3) Planning for the care, handling, and preservation of the assets (especially for ongoing businesses, animals, perishable items, chemicals and pharmaceuticals, foreign assets, etc.).

The overarching goal of pre-seizure planning is to maximize the impact of forfeiture(s) on the criminal activity, while minimizing the costs incurred by the Government. Simply because an asset can be seized by the Government, does not mean that it necessarily should be seized – e.g., where an asset is financially underwater.

C. Seizure and Restraint of Property

The Government may preserve property for forfeiture through pre-trial seizure and restraint. A warrant is the preferred method of seizing property for forfeiture because it allows for independent judicial review to confirm probable cause exists for the seizure; and because a judge's determination of probable cause carries a presumption of validity and therefore the court-issued warrant protects the seizing officer from liability for an illegal seizure. Property may be seized through a court-issued search and seizure warrant supported by probable cause, where the property is listed among the items to be seized (e.g., cash or other proceeds of the offense; computers, computer storage devices, and other items used to facilitate a child pornography offense; etc.). Property may also be seized pre-trial pursuant to a forfeiture seizure warrant that sets forth probable cause for forfeiture – i.e., the predicates referenced above: (1) the asset is of a forfeitable type; (2) statutory authority for forfeiture; (3) one or more of the theories of forfeiture – whether a proceeds, facilitation, money laundering, human trafficking, RICO, and/or terrorism theory; and (4) and a factual nexus between the property and the crime. In order to seize property without a warrant, the Government must establish the applicability of an exception to the Fourth Amendment's warrant requirement.

The Government may not seize real property via a seizure warrant. Instead, real property is “secured” by the Government's filing of *lis pendens* in the local land records. A *lis pendens* warns the public that title to certain property is subject to litigation (i.e., in this context, the Government is seeking title through forfeiture) and that any interests acquired during the pendency of the suit are subject to its outcome. The *lis pendens* is filed after litigation over the property has commenced through the filing of an *in rem* civil forfeiture complaint or the

inclusion of the property in the criminal complaint or indictment. A *lis pendens* is not a formal restraint per se, but rather serves to put prospective purchasers on notice that the real property is involved in litigation.

In order to forfeit an ongoing business, the Government typically will seek a court-issued restraining order or protective order that allows normal operations to continue while the U.S. Marshals Service (“USMS”) reviews the business to determine whether seizure is appropriate. In making this assessment, the USMS will conduct on-site inspections, review the business’s financial records in consultation with the U.S. Attorney’s Office, and conduct employee interviews.

The Government will also seek a pre-trial restraining order to restrain a defendant’s ownership interest in a business (e.g., to restrain their shares of stock, membership interest, or partnership shares), the financial and/or physical assets of the business (e.g., bank accounts, accounts receivable, inventory, equipment licenses), or both. Protective orders and restraining orders can be drafted to authorize the USMS (or, a court-appointed trustee or monitor) to monitor all financial and operational activities of the business, assume signatory control over the business bank accounts, and approve certain business transactions. Management/operational responsibilities will not be assumed, at least during the assessment period. As an alternative to seizure of the business, which can be a complicated endeavor, the Government instead may consider revocation of a license essential to operation of the business by state/local authorities.

IV. Administrative Forfeiture

In the federal system, a common method for forfeiting assets is administrative forfeiture, which is a non-judicial process performed by a federal seizing agency (e.g., FBI, DEA, etc.). The seizing agency usually takes possession of the property pursuant to a warrant or an arrest.

In 2000, Congress substantially revised applicable rules to ensure that property owners are afforded due process. Under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), codified as 18 U.S.C. § 983, the seizing agency must begin the forfeiture proceeding within a fixed period of time and must give the property owner ample time to file a claim. The agency must send notice of intent to forfeit to anyone with a potential interest in contesting forfeiture of the property and by publishing notice of the property’s potential forfeiture in the newspaper. If

no claim is filed within the prescribed period of time, the agency concludes the matter by entering a declaration of forfeiture, and title to the property passes to the United States. *See* 18 U.S.C. § 983(a)(2). If someone files a claim, the agency must defer to the U.S. Attorney's Office, which must commence a judicial action within ninety (90) days (absent an *ex parte* court-issued extension where certain criteria are met) or return the property. 18 U.S.C. §§ 983(a)(1) and (2) (enacted by CAFRA) and 19 U.S.C. §§ 1602 *et seq.* Specifically, the U.S. Attorney's Office has three options if a claimant files a timely, valid claim: (1) file a civil forfeiture proceeding; (2) include the property in a criminal indictment or information; or (3) return the property.

Various types of property are subject to administrative forfeiture including coins and currency of any amount; conveyances (vehicles, vessels and aircraft); personal property valued at \$500,000 or less; and contraband. However, real property and personal property (e.g., bank accounts, securities accounts, but excluding cash or monetary instruments) having a value in excess of \$500,000 must always be forfeited judicially.

V. Criminal (Judicial) Forfeiture¹

A. Arrest/Charging

The forfeiture AUSA typically works in close contact with the criminal AUSA(s) drafting the charging instrument (whether a criminal complaint or an indictment) to ensure that forfeiture allegations are included in the charging instrument. Additionally, the forfeiture AUSA will want

¹ Given that the primary focus of this briefing is on criminal asset forfeiture, this statement does not address federal civil forfeiture at length. By way of background, a civil forfeiture proceeding is an *in rem* action seeking judgment "against the thing," or the subject property. For example, the caption would read something to the effect of *United States v. 123 Main Avenue*. The Government may choose to pursue both civil forfeiture and criminal prosecution at the same time. If there are parallel civil and criminal forfeiture proceedings, either party may move to stay the civil forfeiture proceeding pursuant to 18 U.S.C. § 981(g) to prevent civil discovery obligations from interfering with the related criminal proceeding. In addition, a civil forfeiture complaint may be filed under seal to protect an ongoing criminal investigation. Grand jury material may be shared with the federal prosecutor handling the civil forfeiture case. Fed. R. Crim. P. 6(e); 18 U.S.C. § 3322. Civil forfeiture may be preferable to criminal forfeiture. The Government can only criminally forfeit property the defendant owns or has an interest in; whereas the Government could utilize civil forfeiture to forfeit an entire home jointly owned by the defendant and a paramour. Moreover, criminal forfeiture cannot reach the property of fugitives or deceased persons because said persons cannot be convicted, but their property can be forfeited using civil forfeiture.

to time the execution of a forfeiture seizure warrant to occur on the date of the arrest so as not to tip off the defendant/property owner of the impending criminal arrest and thereby risk abscondment and/or dissipation or disposal of the asset(s).

In order to preserve the ability to seek criminal forfeiture, the charging instrument will at a minimum include very general forfeiture allegations for every charge that could support a criminal forfeiture. The forfeiture allegation(s) should cite the applicable forfeiture statute(s) but does not have to list the specific property or the exact amount sought for forfeiture. Additional property not specified in the charging instrument can later be added by the Government using a bill of particulars.

Where the indictment includes forfeiture allegations referencing specific forfeitable property or a specific amount due as a forfeiture money judgment, the criminal AUSA should instruct the grand jury on forfeiture as part of the proposed indictment presentation and request a finding by the grand jury that not only is there probable cause to believe the charged crime(s) have been committed, but that there also is probable cause to believe that the requisite nexus exists between the offense(s) charged in the indictment and the asset(s) allegedly subject to forfeiture. Indeed, where the grand jury makes such a probable cause finding, the Government may seek a post-indictment restraining order against the property pursuant to 21 U.S.C. § 853(e)(1)(A). *See Kaley v. United States*, 571 U.S. 320 (2014) (just as it is sufficient to support the issuance of a warrant for the defendant's arrest, the grand jury's finding of probable cause is sufficient to support the restraint of his property). A post-indictment restraining order typically is sought from the federal district court while the indictment remains under seal pending the defendant's arrest, via an *ex parte* application supported by an affidavit setting forth probable cause for the property's restraint.

B. Pre-Trial Restraints/Attorney's Fees

A defendant may face a situation where the pre-trial restraint of their assets deprives them of the means to retain counsel of their choice. In *Luis v. United States*, 136 S. Ct. 1083 (2016), the Supreme Court held that in the context of the pretrial restraint of untainted assets, the defendant's Sixth Amendment right to counsel of their own choosing necessarily trumped the Government's various interests in preserving/restraining untainted substitute assets. However,

the Supreme Court limited its holding to untainted assets, while effectively upholding the pre-trial restraint of assets that the Government has shown probable cause to believe are tainted. The Supreme Court explained, as to tainted assets, that “[a]s soon as [the possessor of the forfeitable asset committed the violation] . . . , the forfeiture . . . took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all right, title, and interest then remaining in the [possessor]; and was as valid and effectual, against all the world, as a recorded deed.” *Id.* at 1092 (internal citation and quotation marks omitted).

As a result, a defendant seeking the release of restrained forfeitable assets to pay attorney’s fees faces a high hurdle. *See U.S. v. Monsanto*, 491 U.S. 600, 615 (1989) (Government can restrain forfeitable assets before trial, even if a defendant needs those assets to pay for his counsel of choice, as long as the Government has probable cause to believe the assets are forfeitable); *U.S. v. Yusuf*, 199 Fed. Appx. 127, 132 n.3 (3d Cir. 2006) (if the Government establishes probable cause at the *Monsanto* hearing, the property must remain under restraint; the defendant’s 6th Amendment right to obtain counsel of his choice applies only to the use of his own legitimate, nonforfeitable funds).

A defendant does not have the right to a so-called *Monsanto* hearing to determine if there is probable cause for the pre-trial asset(s) restraint(s) if the defendant first cannot satisfy the *Jones-Farmer* test set forth in *U.S. v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) and *U.S. v. Farmer*, 274 F.3d 800, 805-06 (4th Cir. 2001). Under the *Jones-Farmer* test, a defendant has a right to a probable cause hearing on the legality of pre-trial assets’ restraints only if: (1) he has no other assets with which to retain counsel of his choice (and the court may consider whether there are family or friends who can loan the defendant money); and (2) there is a bona fide reason to believe that the grand jury (or the court) erred in finding probable cause to believe the property is subject to forfeiture. Failing the first prong of the *Jones-Farmer* test is fatal to the defendant’s motion for a probable cause hearing. If the defendant survives the first prong to reach the second prong for determining whether a probable cause hearing will be held, the defendant cannot challenge the grand jury’s finding of probable cause with respect to the underlying crime(s); rather, the defendant is limited to challenging the probable cause

determination regarding the nexus between the property and the offense(s). *See Kaley*, 571 U.S. at 331 n.9.

C. Guilty Pleas

In the federal system, the vast majority of criminal cases ultimately resolve by guilty plea – with the defendant either pleading guilty to a specific count(s) of the Indictment or waiving indictment and pleading guilty to an Information. If the Government is seeking forfeiture, the plea agreement will include forfeiture provisions whereby the defendant agrees to forfeit specific assets and/or a specific Forfeiture Money Judgment. The plea agreement language should not only include the specific property/amount of money to be forfeited, but also the defendant’s agreement to forfeit the property as a result of his commission of the offense(s) to which he is pleading guilty and an explanation of the applicable forfeiture theory and the nexus between the forfeitable property and the offense(s) of conviction (e.g., forfeitable property constitutes proceeds of the offense, facilitating property, property involved in money laundering, etc.). At the plea hearing, the defendant should be advised that forfeiture is among the collateral consequences to his guilty plea; and the questions posed to the defendant to ensure that there is a factual basis for the guilty plea should include questions pertaining to the defendant’s personal receipt of the property subject to forfeiture (*see Honeycutt* discussion below). At the plea hearing or sometime after the entry of defendant’s guilty plea and prior to sentencing, the Government and the defendant enter into a preliminary consent order of forfeiture, whereby the defendant agrees to forfeit specific asset(s) and/or money.

D. Trial

If a defendant chooses to pursue their constitutional right to a jury trial and contests forfeiture, there will be a bifurcated trial pursuant to Federal Rule of Criminal Procedure 32.2(b)(1). The first phase of the trial is the traditional guilt phase. The second, forfeiture phase of the trial occurs only if the jury returns a guilty verdict against the defendant thereby finding that the Government proved beyond a reasonable doubt that the defendant committed the charged crime(s). A defendant wishing to have the jury decide forfeiture must specifically request to retain the jury for the forfeiture phase prior to the start of jury deliberations. *See Fed. R. Crim. P. 32.2(b)(5)*. Otherwise, the presiding judge will decide forfeiture during the second

phase of the trial. A special jury charge (if applicable) and a special verdict form are used for the forfeiture phase of trial.

The Government's burden of proof in the forfeiture phase of trial is a preponderance of evidence that there is a "nexus" between the specific property that the Government seeks to forfeit and the offense(s) of conviction. *But see U.S. v. Pellulo*, 14 F.3d 881, 906 (3d Cir. 1994) (beyond a reasonable doubt standard applies to RICO forfeiture phase of trial). The rules of evidence do not apply during the forfeiture phase of trial (evidence only needs to be "reliable") and hearsay is admissible. *See U.S. v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010); *U.S. v. Capoccia*, 503 F.3d 103, 109 (2d Cir. 2007). In addition, the trier-of-fact may consider evidence already in the record from the guilt phase of the trial. The court (not jury) determines the amount of a personal money judgment. Once the trier-of-fact reaches its determination, its forfeiture findings are incorporated into a preliminary order of forfeiture. The ownership rights of third parties are resolved in separate ancillary proceedings once a preliminary order of forfeiture is issued.

E. Third-Party Claims

After the property is deemed preliminarily forfeitable as to the defendant (whether upon conviction by plea or trial), the second stage of forfeiture proceedings commences to address claims to the property by third parties. *See* 21 U.S.C. § 853 and Fed. R. Crim. P. 32.2. The Government publishes notice of forfeiture and sends notice to third parties. The third party (e.g., a spouse, girlfriend, parent, bank, etc.) may then file a petition for return of the property to the third party by establishing entitlement to the property under one of two grounds – either: (1) a vested right in the property superior to that of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property; or (2) status as "a bona fide purchaser of the property." *See* 21 U.S.C. § 853(n)(6). If the asset was purchased by the third party during or after the defendant's commission of the criminal scheme, the third party has no superior vested right. And if, for example, the property was obtained by the third party with money gifted by the defendant, the third party is not a "bona fide purchaser." *See U.S. v. Nicoll*, 2015 U.S. Dist. LEXIS 90454 (D.N.J., July 9, 2015), *aff'd*, *US v. Nicoll*, 711 F. App'x 108, 111 (3d Cir. 2017), *cert. denied Singh v. U.S.*, 138 S. Ct. 2602 (2018).

F. Sentencing

1. Final Orders of Forfeiture

Where sought by the Government, a federal court must impose forfeiture as part of the defendant's sentencing – it is not discretionary. *See U.S. v. Monsanto*, 491 U.S. 600, 607 (1989). The final order of forfeiture is entered no later than sentencing and must be included in the court's oral announcement of the defendant's sentence and in the judgment. *See* Rules 32.2(b)(1), (2) and (4); *U.S. v. Bennett*, 423 F.3d 271, 276 (3d Cir. 2005) (a "final order of forfeiture" that is not entered until after sentencing is a nullity). However, the court's failure to issue an order of forfeiture at or prior to sentencing or to include it in the judgment may be corrected as a clerical error pursuant to Fed. R. Crim. P. 36, where the defendant has agreed to forfeiture in the plea agreement or a verdict finding the property forfeitable is returned. *See U.S. v. Pelullo*, 305 Fed. Appx. 823, 827-28 (3d Cir. 2009).

2. Forfeiture Money Judgments

The final order of forfeiture may include the forfeiture of specific assets and/or a "Forfeiture Money Judgment" equivalent to the amount of criminal proceeds personally obtained by the defendant. Prior to the Supreme Court's ruling in *Honeycutt v. U.S.*, 137 S. Ct. 1626 (2017), the Government often sought to impose joint and several liability on each member of a conspiracy, whereby – as it continues to apply to restitution – a member of the conspiracy can be ordered to forfeit the total amount of the proceeds obtained from the conspiracy as a whole and each payment made by a member of the conspiracy offsets the total amount owed jointly and severally by all members of the conspiracy. *Honeycutt* ended this practice with respect to forfeiture money judgments. There, the Supreme Court clarified that the forfeiture provisions in 21 U.S.C. § 853 do not impose joint and several liability on each member of a drug conspiracy. As a result, the Government may seek forfeiture only of "any property constituting, or derived from, any proceeds" that the defendant "obtained, directly or indirectly" from the offense giving rise to the forfeiture.

There is a circuit split as to whether *Honeycutt* applies to non-drug cases, but the Third Circuit has held that *Honeycutt* does apply outside of the drug conspiracy context. *See U.S. v. Gjeli*, 867 F.3d 418 (3d Cir. 2017) (*Honeycutt* applies with equal force to the forfeiture of

proceeds in a RICO case under § 1963(a)(3) and to the forfeiture of extortion proceeds under § 981(a)(1)(C)).

Notwithstanding the Supreme Court's holding in *Honeycutt*, federal prosecutors may continue to obtain forfeiture money judgments. However, they must determine the amount of proceeds that the defendant obtained individually, unless the defendant was the mastermind of a conspiracy/scheme (e.g., the drug kingpin), in which case he may be held liable for the proceeds obtained by those under them working at his direction.

Determining whether a conspiracy defendant obtained tainted property subject to forfeiture can be complicated and there may be room for negotiation between the Government and the defendant in that regard. The Government must consider whether the defendant has an "ownership interest" in the tainted property or in the entity that has acquired the tainted property. "Ownership" is defined as "dominion and control" over the property. *See, e.g., In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005) (rejecting claim of defendant's son who was the titled owner of the property but acted only as a nominee with no dominion and control over the property). The Government will also consider whether the defendant "personally benefitted" from tainted property. For example, any wages or salary earned by a conspiracy defendant as part of the criminal scheme may be forfeitable. *See Honeycutt*, 137 S. Ct. at 1631-32. In addition, a defendant who "comes into possession of" or acquires tainted property may have to forfeit said property, but a drug courier/low-level drug dealer who only briefly possessed proceeds should not be subject to their forfeiture, unless said proceeds were in the courier/low-level drug dealer's possession at the time of arrest.

VI. Forfeiture and Victim Compensation

If statutorily authorized by the offense(s) of conviction, a federal court must order forfeiture and restitution as part of the Judgment of Conviction. Ordering both forfeiture to the Government and restitution to the crime victim(s) does not constitute double recovery, because each serves a different purpose. *See U.S. v. Fitzmartin*, 2010 WL 2994216, *3 (E.D. Pa. 2010) (following *U.S. v. Various Computers and Computer Equipment*, 82 F.3d 582, 588 (3rd Cir. 1996)). Forfeiture is primarily punitive whereas restitution is compensatory. Because there is no provision in the restitution statutes to preserve property for restitution prior to sentencing, the

asset preservation provisions of the forfeiture statutes are critical to preserving assets for victim compensation. But the discretion to use forfeited funds to compensate victims lies exclusively with the Government and cannot be court ordered.

A. Restoration

Restoration is the use of forfeited funds to pay restitution. The Attorney General of the United States, by delegation to the Money Laundering and Asset Recovery Section (MLARS, f/k/a AFMLS) of the Criminal Division of the Department of Justice, is authorized to transfer forfeited funds to the Court for satisfaction in whole or in part of a criminal restitution order. The U.S. Attorney's Office, in consultation with the seizing agency, requests restoration. Criminal AUSAs may not make any promises to defense counsel, or any representations to the Court that forfeited assets or any payment by the defendant toward the forfeiture money judgment will automatically be credited to restitution. Neither the U.S. Attorney's Office nor the Court has the authority to apply or order the application of forfeited assets to restitution – only MLARS. The time for filing an appeal challenging either the restitution order or the forfeiture must have passed, or all relevant appeals adjudicated, prior to submission of restoration request to MLARS.

In the U.S. Attorney's Office's memo to MLARS requesting restoration in a particular case, certain representations must be made, namely:

1. All known victims have been properly notified of restitution proceedings and are accounted for in the restitution order.
2. Losses described in restitution order have been verified and are accurate, and reflect all sources of compensation received by the victims, including returns on investments, interest payments, insurance proceeds, lawsuit awards, etc.
3. Reasonable efforts to locate additional assets show that the victims have no other recourse to obtain compensation.
4. No evidence to suggest that the victims knowingly contributed to, participated in, benefited from, or acted in a willfully blind manner to the commission of the offense(s) underlying forfeiture or a related offense.

Forfeited funds restored for payment of restitution may be the only meaningful assets available for payment of restitution. As a result, forfeiture can serve a critical role in restraining, preserving, and funding restitution through the process of restoration.² One need look no further than the Bernie Madoff case to see the critical role that asset forfeiture can play in victim cases. In March 2009, Madoff pled guilty to charges arising from his orchestration of the largest Ponzi scheme in history. In June 2009, he was sentenced to 150 years in prison and ordered to forfeit \$170.799 billion. By April 2020, the Madoff Victim Fund (MVF) had distributed over \$2.7 billion in forfeited funds to nearly 38,000 victims worldwide, allowing them to recover almost 74 percent of their losses. *See* DOJ Press Release (Apr. 20, 2020), *available at* <https://www.justice.gov/opa/pr/justice-department-announces-additional-distribution-more-378-million-victims-madoff-ponzi>.

VII. Conclusion

Asset forfeiture is a nuanced area of criminal law that requires at least a basic understanding of its predicates by defense attorneys. On the Government side at the U.S. Attorney's Office, there usually is a stand-alone forfeiture unit or at least one or more AUSAs specifically trained to handle forfeiture matters. The federal law enforcement agencies also have dedicated forfeiture personnel who handle not only administrative forfeiture, but who also work closely with the U.S. Attorney's Office in seizure planning and execution for judicial forfeiture proceedings (whether criminal and/or civil). Federal courts also typically have to be educated on the forfeiture process for the rare trial involving, still rarer, contested forfeiture matters. On balance, however, I believe that the tracing requirements – particularly the heightened standard employed by the Third Circuit; the Supreme Court's *Honeycutt* ruling barring joint and several liability and limiting forfeiture money judgments generally to only the specific proceeds obtained by the defendant; and the CAFRA claimant notice requirements provide important safeguards against federal Government overreach.

² Remission is similar to restoration, but differs in that an individual victim applies directly to MLARS for the turnover of forfeited funds for payment of restitution. MLARS will consider the same factors as above for remission petitions as well. Restoration can be preferable to remission, particularly in complicated multi-defendant, multi-victim cases, since with restoration MLARS can render its adjudication as a whole, restoring forfeited funds to each victim on a pro rata basis, as opposed to remission which requires piecemeal determinations.

At the same time, asset forfeiture continues to play a critical role in the punishment and deterrence of criminal activity. Forfeiture also serves the important objective of removing the tools of illegality from criminals' hands – e.g., firearms, video and other camera equipment used to produce child pornography, stash houses, boats and other conveyances used for human smuggling/trafficking, and the like. Asset forfeiture also takes the profit out of crime and can serve as an important means of preserving assets for use to fund victim compensation.

PREPARED MEMORANDUM
OF
GREG GLOD
Submitted to the
The New Jersey Advisory Committee
To
The U.S. Commission on Civil Rights
For
Overview Panel on Collateral Consequences Impact on Criminal Asset Forfeiture

Monday, September 21, 2020
(3:00 pm – 4:30 pm)

Introduction

Thank you for the opportunity to allow me to present testimony before the New Jersey Advisory Committee to the US Commission on Civil Rights. I am delighted that the Advisory Committee has taken an interest in civil asset forfeiture and its detrimental impact on due process and our communities. I will focus my testimony on four areas: 1) a general overview of civil asset forfeiture and consequences of current practices surrounding it; 2) how civil forfeiture has shown to be an ineffective tool to combat drug crime and curb drug use; 3) recent legislative reforms/proposals at the state and federal level to forfeiture; and 4) recent court challenges to civil asset forfeiture and their possible implications.

In summary, civil asset forfeiture deprives individuals necessary due process protections, creates perverse incentives within law enforcement that reduces bandwidth for core public safety functions, and has not been an effective crime fighting or drug use prevention tool as proponents claim it to be. Recent legislative efforts and judicial decisions show that more and more stakeholders across the political spectrum are eager to reform the practice and bring about a more equitable justice system.

Overview

Ella Bromwell, a 72-year-old widow, lives in in Conway, South Carolina. In 2007, some of the people in her neighborhood began selling drugs outside her home without her consent and while she was asleep or at work. She tried just about everything she could to have them stop: putting up no trespassing signs, pleading with the dealers to cease their operations, trimming her bushes so the cops could see her porch but the city didn't think it was enough. Officials in the city attempted to seize her home in 2007. She eventually agreed to pay them \$5,000 in order to keep her home. Part of that agreement stated that if anyone sold drugs on her property again, she would not be considered an "innocent owner" and she could lose her house unless she paid another \$5,000. Then in 2011, dealers were caught selling drugs again on her property while she was away or asleep. City officials again tried to seize her home. Finally after years of legal battles with the city, a Judge wrote a scathing opinion regarding the actions of the city and agreed that there was no reason to try and take an old woman's home just because it was located in a drug infested area. Bromwell still doesn't feel like she's out of the clear quite yet and for good reason: the city manager has subsequently said "similar court actions would be employed if any property owner was not responsive to cooperative efforts to quell extreme and persistent disturbances

to peace in the community.” In other words, a 77-year old woman must try and stop criminal activity she has no part in or potentially be subject to losing her home.¹

This disturbing story illustrates the potential consequences of modern-day civil asset forfeiture. Civil asset forfeiture is the practice by which law enforcement can seize an individual’s property and take possession of it solely on the belief that either the property was 1) used in the commission of a crime; or 2) was derived from criminal activity. Unlike other cases in which the defendant is the subject of the case, it is in fact the property itself that stands trial. Instead of “State v. Johnson,” you get cases such as *State of Texas v. One 2004 Chevrolet Silverado*² or *United States v. One Lucite Ball Containing Lunar Material (One Moon Rock) and One Ten Inch by Fourteen Wooden Plaque*.³ Although comical, this change in who stands trial has major legal consequences. Since the property is charged and not the person, the case is now within the world of civil procedure where basic due process rights found in criminal procedure are no longer enjoyed by the property owner. This routinely means that the government only needs to prove that the property was more likely than not involved in criminal activity and the burden rests on the property owner to prove the innocence of their stuff.⁴

To make matters worse, most states allow for law enforcement to keep most or all the proceeds from forfeited property. In New Jersey, law enforcement can keep up to 100% of the profits from a forfeiture.⁵ A study done by the Texas Office of Court Administration found that many District Attorney’s Offices in Texas heavily relied on forfeiture funds to fund their offices. In fact, forfeiture funds actually amounted to more money than their overall general budgets.⁶ Additionally, a survey of 770 law enforcement agencies found that nearly 40 percent saw forfeiture funds as “necessary” to their budgets.⁷ This creates a perverse incentive for law enforcement and also reduces their time and energy from areas of their jobs that increase public safety and better community relations.

Evidence Against Civil Asset Forfeiture

“As any of these law enforcement partners will tell you and as President Trump knows well, civil asset forfeiture is a key tool that helps law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed, and it weakens the criminals and the cartels.” Jeff Sessions, then United States Attorney General made these remarks to law enforcement officials on July 19, 2017⁸ when he was announcing the federal government’s reinstatement of “adoptive forfeitures,” which allow state and local officials to turn over forfeitures to the federal government and in return they get to keep up to 80% of the profits. This allows for state and local officials to bypass their state law and use federal forfeiture law which has a very low burden and lacks necessary due process protections.⁹

¹ Ellis, Mike. January, 2020. [“For Years, a SC City Tried to Seize a Widow’s Home. It Still Might.”](#) Greenville News.

² Blakeslee, Nate. April 16, 2014. [“The Silverado Fought the Law, and the Law Won.”](#) Texas Monthly.

³ [252 F.Supp.2d 1367 \(2003\).](#)

⁴ [Leonard v. Texas, 580 U.S. , \(2017\).](#)

⁵ [“Policing for Profit, The Abuse of Civil Asset Forfeiture 2nd Edition.”](#) Institute for Justice.

⁶ Slayton, David. December 2014. [“Asset Forfeiture: DPS and County Interactions.”](#) Office of Court Administration.

⁷ Worrall, John Worrall. 2001. [“Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement.”](#) Journal of Criminal Justice.

⁸ Office of Public Affairs, United States Department of Justice. July 19, 2017. [“Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets by State or Local Law Enforcement.”](#)

⁹ Stillman, Sarah. August 15, 2017. [“Jeff Sessions and the Resurgence of Civil-Asset Forfeiture.”](#)

This type of argument is consistently made by proponents for civil forfeiture but does the data support this?

Defunding High Level Criminals

Removing the ill-gotten gains from drug kingpins is a common argument for civil forfeiture. While no one would suggest criminals should be able to keep the fruits of their illegal behavior, is civil asset forfeiture putting a dent in the pockets of the cartels? The short answer is no. While it is difficult to determine exactly how much money cartels make, a 2017 study from Global Financial Integrity estimated the retail value of transnational drug-trafficking crime at anywhere between \$426-\$652 billion.¹⁰ Rand estimated \$6-8 billion in revenue for Mexican drug trafficking organizations annually.¹¹ The Congressional Research Service estimated in a 2018 report that the drug trade in Mexico alone is likely bringing in \$5-7.5 billion annually,¹² while Reuters reported in 2018 that cartels are believed to bring in over \$21 billion each year.¹³

You would think that most civil forfeitures would have to be in the hundreds of thousands or millions to even make a minor impact into narco-trafficking organizations. However, estimates show that most forfeitures are much less. A Greenville News report showed that when South Carolina police seized cash, it was for less than \$1,000. The report also showed that although Black men represent 13 percent of South Carolina's Population, they make up 65 percent of all forfeitures.¹⁴ Reports from Philadelphia¹⁵ and Dallas¹⁶ showed similar low averages with similar disparate impacts on the Black community. What this shows is that most forfeitures are not big busts making kingpins south of the border pull their hair out, but small amounts from lower-income individuals who are disproportionately Black.

Defeating the War on Drugs

Civil forfeiture proponents also indicate that the practice is a necessary tool to win the "War on Drugs." However, several data points suggest that this is likely not the case. First, illicit drug use continues to remain high in America. According to the Substance Abuse and Mental Health Services Administration, 57.2 million Americans aged 12 or older (20.8 percent) used an illicit drug in 2019; an increase from 2015 (17.8 percent of Americans.).¹⁷ Second, Drug overdose death rates in the United States have risen steadily, from barely 1 death per 100,000 in 1970 to a peak of 21.7 in 2017.¹⁸ Third, drugs continue to

¹⁰ May, Channing. March 2017. "[Transnational Crime and the Developing World](#)." Global Financial Integrity.

¹¹ Kilmer, Beau; Caulkins, Jonathan; Bond, Brittany; Reuter, Peter. 2010. "[Reducing Drug Trafficking Revenues and Violence in Mexico](#)." RAND.

¹² Congressional Research Service. *updated* July 28, 2020. "[Mexico: Organized Crime and Drug Trafficking Organizations](#)."

¹³ Stargardter, Gabriel. January 24, 2018. "[Mexico's Drug Cartels, Now Hooked on Fuel, Cripple the Country's Refineries](#)." Reuters.

¹⁴ Lee, Anna; Cary, Nathaniel; Ellis, Mike. January 17, 2020. "[TAKEN: How Police Departments Make Millions by Seizing Property](#)." Greenville News.

¹⁵ ACLUPA. June 2015. [Guilty Property: How Law Enforcement Takes \\$1 Million in Cash from Innocent Philadelphians Every Year- and Gets Away with it.](#)"

¹⁶ Nicholson, Eric. March 2015. "[Dallas-Area Cops Seize Millions in Cash and Property Every Year, and No One Fights Them](#)." Dallas Observer;

¹⁷ Substance Abuse and Mental Health Administration. September 2020. "[Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health](#)."

¹⁸ Centers for Disease Control. "[Unintentional Drug Poisoning in the United States](#)."

flow into the United States at record quantities. In 2019, Customs and Border Protection seized 20 tons of cocaine from one ship in Philadelphia's port. The cargo, worth more than a billion dollars, was the largest cocaine seizure in U.S. history and indicates the vast resources still available to cartels despite interdiction efforts.¹⁹ Law enforcement's record narcotics seizures in recent years say more about the size and logistical capability of cartels than the success of interdiction efforts and as mentioned above, cartels are still bringing in billions of dollars annually in profit. Fourth, a recent study performed by the Institute for Justice looked at the US Department of Justice's equitable sharing program (where the federal government cooperates with local law enforcement on seizures and forfeitures) and its impact on local crime, drug use, and its relationship with local economic conditions. The study provides strong evidence to suggest that increased equitable had little to no effect on fighting crime and its use is driven by financial incentives and not public safety. Specifically, the study found:

1. More use of equitable sharing did not result in more crimes being solved;
2. More equitable sharing did not reduce drug use; and
3. When local jurisdictions' economies were not performing well, equitable sharing increased.²⁰

If civil forfeiture is an effective tool at combatting the "War on Drugs," it's hard to find evidence to support that notion.

Recent Legislative Changes/Proposals

In the past few years, most states have made some alterations to their civil forfeiture laws to bring heightened transparency, greater due process protections, curbing federal involvement that allows for circumvention of state law, or elimination of the practice altogether. The Institute for Justice keeps an updated repository outlining recent and historical reforms to asset forfeiture laws across the country. Without going into specific bill details, below is a topline summary of how many states have modified their forfeiture laws in varying areas of reform:²¹

- Three states (NC, NM, NE) have abolished the practice of civil forfeiture entirely.
- Fifteen states require a conviction in criminal court before a civil forfeiture proceeding can occur; most recently, Virginia in 2020.²²
- Thirteen states require the government, rather than the property owner to have the burden of proof in a civil forfeiture proceeding.
- Since 2014, 25 states have increased forfeiture reporting requirements; most recently West Virginia²³ and New Jersey in 2020.²⁴
- Seven states and Washington DC have passed laws to prevent local officials and the federal government from circumventing state law through equitable sharing.

¹⁹ De Groot, Kristen. June 21, 2019. "[Cocaine Haul From Ship Grows, Arrests Now Stand At 6.](#)" Yahoo News.

²⁰ Kelly, Brian. June 2019. "[Fighting Crime or Raising Revenue?](#)" Institute for Justice.

²¹ "[Civil Forfeiture Reforms on the State Level.](#)" Institute for Justice.

²² [HB 1522](#). Virginia Regular Session 2020.

²³ [HB 4717](#). West Virginia Regular Session 2020.

²⁴ [S 1963](#). New Jersey 2018-2019 Regular Session.

The federal government has attempted to pass forfeiture reforms for years but have not made much progress. The most comprehensive bill, the FAIR Act, has bipartisan support but has not advanced in Congress since its introduction. Specifically, the bill would:²⁵

- Increase the burden of proof for the government from a “preponderance of the evidence” to “clear and convincing” and requires greater specificity to be proven when the government’s theory is the property was used in the commission of the crime.
- Provide greater protections to innocent property owners by shifting the burden from the property owner to the government.
- Remove the profit incentive from Department of Justice by requiring proceeds to go to the General Fund of the US Treasury.
- Remove the equitable sharing program.
- Require the IRS to prove that a defendant “knowingly” tried to deposit funds to evade IRS detection before they can forfeit property and to hold a probable cause hearing 14 days after seizure.
- Increase the standards by which courts should consider proportionality of the forfeiture to the underlying criminal conduct.
- Require reporting on which forfeitures came from criminal and which ones from civil.
- Effectively eliminating all administrative (or nonjudicial) forfeitures which allows the agency, and not a judge to forfeit your property in certain circumstances when a defendant doesn’t challenge the forfeiture quickly enough. This would force government to go to court and provide greater due process.

Recent Court Cases

There have been dozens of challenges to the practice of civil asset forfeiture over the years, however, I will focus on two recent cases that could have a substantial impact on current practices:

Timbs v. Indiana

In 2013, Tyson Timbs purchased a Land Rover for \$42,000 from proceeds he received from his dad’s life insurance policy. Over the next several months, Timbs used the car multiple times to transport heroin. Timbs was eventually arrested and pleaded guilty to two drug related charges and was sentenced to six years in prison, with five of those being suspended, as well as paying fees totaling \$1,200. Additionally, the State of Indiana initiated a forfeiture action against his car, but the trial court denied it as being grossly disproportional to the actual seriousness of the offense, pursuant to the 8th Amendment’s Excessive Fines Clause. The court reasoned that the maximum fine for the offense was only \$10,000, and the car was worth roughly four times that amount.

The State of Indiana appealed, arguing that the 8th Amendment’s Excessive Fines Clause was never “incorporated” under the Fourteenth Amendment, meaning the State did not need to abide by it. The case eventually went to the US Supreme Court. On February 20, 2019, a unanimous Court agreed that the Eight Amendment’s Excessive Fines Clause was indeed incorporated and states needed to ensure that a forfeiture of assets is not excessive to the underlying criminal activity. This case will have

²⁵ June 26, 2020. “[Senators Crapo, Paul, King, Lee Introduce FAIR Act to Reform Civil Asset Forfeiture Process, Protect Innocent Americans.](#)”

major implications on forfeiture proceedings moving forward and act as a necessary check against disproportionate takings of property.²⁶

South Carolina v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars

This case originated in Horry County, South Carolina in which a county trial judge ruled that South Carolina's civil forfeiture laws violate the Fifth, Eighth, and Fourteenth Amendments to the US Constitution as well as certain provisions of the South Carolina Constitution. As the title notes, this case involves the forfeiture of over \$20,000 from an individual serving a 15-year prison sentence on drug dealing charges. Specifically, the judge noted that the statutes violate the Excessive Fines Clause (as noted in the *Timbs* Case above), violates the US and SC Constitutions by placing the burden on the owner to prove their property's innocence, unconstitutionally incentivizes forfeitures due to law enforcement receiving substantial proceeds from them, and is unconstitutional because the laws do not mandate judicial review or judicial authorization prior to or after the seizure.²⁷ The case has been appealed and is expected to be heard by the South Carolina Supreme Court in the coming months.²⁸

If the South Carolina Supreme Court agrees with the trial court, this could obviously have major ramifications on civil forfeiture in the state and across the country.

²⁶ [Timbs v. Indiana](#), 586 U.S. ____ (2019).

²⁷ [South Carolina v. Twenty Thousand Seven Hundred Seventy-One And 00/100 Dollars](#), 2017-CP-26-07411.

²⁸ Institute for Justice is [representing the property owner in the case](#).

**STATEMENT
CHRISTINE HOFFMAN, ACTING PROSECUTOR
GLOUCESTER COUNTY, NEW JERSEY
BEFORE
N.J. ADVISORY COMMITTEE TO USCCR
November 17, 2020**

RELEVANT BACKGROUND AS PANELIST

For nearly 8 years, directly supervised DCJ's forfeiture program. Since March 202, directly supervised GCPO's forfeiture program. Also, have served on working groups related to recent legislation.

APPLICABLE LAW

State and county forfeiture programs must follow N.J.S.A. 2C:64-1, et seq.; AG SOPs; and case law.

PURPOSES

There are very important purposes to forfeiture:

1. Take the profit out of crime. Defendants do not keep benefit by keeping their illegal proceeds. If defendants get to keep their illegal proceeds, no deterrence from them continuing to engage in criminal behavior. A substantial portion of crimes are profit driven, only certain crimes are driven by emotion or passion.
2. Prevent further unlawful use of the asset. For example, if law enforcement seizes a drug dealer's drugs and monetary proceeds from drug sales, then that dealer when released cannot easily go and buy a new supply. In a very recent GCPO investigation involving a DTO, our seizure of cash at a stash house prevented the leader from restarting his network and purchasing his large quantities from the Mexican cartel, as evidenced by consensual recordings of a cooperator.
3. Restitution. This is a key purpose in our financial crimes cases, which often have large seizures. Yes, we do expend significant resources looking for assets in these cases. But, we do so because the assets are often hidden and this is the only way that our victims will receive any money back. As the head of financial crimes in DCJ, our seizures typically all went to restitution. In two DCJ elder fraud cases involving attorneys (State v. Robert Novy and State v. Barbara Lieberman) preying upon elderly and vulnerable clients and stealing their life savings, we seized \$10 million in assets. Over \$9 million was returned in restitution and to pay for court-appointed trustees to take over the

4. other law files. It has been tragic in other attorney fraud cases where we could not find any remaining assets.
5. Benefit law enforcement. We are permitted to use forfeited assets for “law enforcement purposes.” That is defined in the AG SOPs and was addressed in very early case law decades ago. What we can and cannot use forfeiture funds is modelled on the federal forfeiture program. Typically, we can only use for specialized equipment, training, or programs. For example, the AG utilized forfeiture funds for grants for body worn cameras to improve policing and to fund gun buy-back programs to address community safety. We CANNOT use for salary or to supplant our budget (i.e., use for regular items that we have budgeted for). And, there are certain checks and balances on our use like approvals and audits. Will mention later the new reporting requirements that will include information as to expenditures.

TYPES OF FORFEITURE ACTIONS

Types of forfeiture actions include civil, criminal, and administrative forfeitures:

1. Civil forfeiture is an *in rem* action brought in court against the property. The property is the defendant and is listed in the caption of the civil complaint. But, any person with interest in the property is considered a claimant. Typically, the criminal defendant in the related criminal case is a claimant. And there may be other claimants to the property that are not criminal defendants. This is the overwhelming majority of our forfeitures in NJ. And will discuss towards end of briefing the monetary thresholds where a criminal conviction is required.
2. Criminal forfeiture is an action brought as part of the criminal prosecution of a defendant. It is against the person and requires the state to indict the property along with the defendant. If the jury finds the property forfeitable, the court issues an order of forfeiture. This is not frequently used in NJ except in racketeering cases. Our racketeering statutes permits this type of forfeiture action, so you will see indictments in those cases that list property. Federal criminal forfeitures are more common, particularly due in part to how and timing of their indictments.
3. Administrative forfeiture is an *in rem* action that permits the seizing agency to forfeit the property without judicial involvement. Unlike the federal forfeiture programs, NJ does not have administrative forfeitures – our forfeitures must be tied to judicial involvement.

Summing up these three types, NJ again is primarily civil forfeiture. It has been suggested that we move towards criminal forfeitures like federal prosecutors. However, recently, monetary thresholds have been set that will require an accompanying criminal conviction. These will account for a significant amount of forfeiture actions in NJ, and these lower monetary amounts in federal system would be handled administratively without any judicial involvement.

Adoptions should also be mentioned. Under adoption, state and local law enforcement can seize property without filing criminal charges. The seized property is then transferred to

federal agencies for forfeiture under their procedures. This nationwide practice has been somewhat controversial. However, in NJ, it is rare that we would engage in adoption. Unlike many states, we have one of the best anti-money laundering statutes that was enacted because of our status as a drug corridor.

Please keep in mind that adoption is different from participating in joint task forces, where the prosecution could be either federal or state. The forfeitures will follow the prosecutions, in other words they stay paired together. So, we do send assets with the criminal charges when the decision is made to proceed federally with the prosecution.

CIVIL FORFEITURES IN NJ

Seizures have three basic requirements:

1. Probable cause. A seizure may only be made if there is probable cause to believe that the asset is prima facie contraband, is property used or intended to be used in furtherance of unlawful activity, is property which has become or is intended to become an integral part of unlawful activity, or is proceeds of unlawful activities including those obtained through the sale of prima facie contraband.
2. Nexus. There must be a relationship between the asset and the unlawful activity. Under case law, that relationship must have direct causal connection. Phrase that we often use is “causal, not casual.”
3. Indictable crimes. Seizures may only be made for unlawful activity that would be of an indictable nature (i.e, constitute a crime and not disorderly persons or petty disorderly offenses). So it is possible that we originally charge a crime, but downgrade to a DP or PDP later. It varies by county whether they will proceed with forfeiture in those cases.

Seizures fall into two basic tracks:

1. Anticipated seizures. In proactive investigations, we will look for assets in advance. In those type of investigations, our forfeiture attorneys are closely vetting the basis for seizure. Our forfeiture team then typically applies to the court for seizure orders as the criminal team applies for search/arrest warrants. And our forfeiture team execute those seizure orders at the same time the criminal team executes the warrants. This is done so the assets don’t disappear.
2. Reactionary seizures. In other investigations, we encounter the assets during the investigation. In those situations, the officers may contact the forfeiture attorney for permission to take the asset at that time. Otherwise, the officers must provide notice within 48 hours of any seizure for the forfeiture attorneys can review the seizure.

Initial process following seizures is:

1. Complaint. State has 90 days to file civil complaint. That is an absolute SOL, no exceptions for any reason.
2. Responsive filings. In most civil actions, the typical responsive filing is an answer. But, this is a little different now in forfeiture actions. Notably, in the recent case of State v.

Luis Melendez, our NJ supreme court held that a defendant's statements in any answer cannot be used in the companion criminal case. And prosecutors must provide an enhanced notice to defendants that an answer is not required. Rather, the response can be a motion for stay. That motion is considered a responsive filing, and the AOC has adjusted its court system for this specific variation.

3. Stays. If an answer is filed, a stay is then granted in nearly all of those forfeiture actions. Either or both parties can request a stay. And have never heard of a court denying the stay.

Civil forfeiture is a parallel action. The civil forfeiture and criminal charges are separate and are not co-dependent. So there are some attorney ethical limitations through the forfeiture process to keep in mind:

1. RPCs. It is unethical to use the criminal charges to influence or benefit the civil case (i.e., offer a better plea offer if agree to civil forfeiture). That doesn't mean that forfeitures cannot be resolved at the same time as the criminal case. In many cases, a criminal resolution would effectively end any defenses so makes sense to resolve at same time in a global resolution. However, the best practice is to have a separate forfeiture attorney file and negotiate the civil matter. Any forfeiture consent orders should be signed and entered through the forfeiture attorney. Would like to refer to a recent example just last year in a nearly \$2 million seizure. DCJ's criminal attorney accepted a criminal plea, but forfeiture action was left outstanding and resolved at a later time after review of asserted defenses by a forfeiture attorney.
2. Grand jury secrecy under court rules. Because of this rule, forfeiture attorneys cannot use any evidence obtained through the grand jury. Again, best practice to keep that level of separation between the civil and criminal files is to have different attorneys. The communication between the two should be focused on procedural status of case, given the likely stay and need to know final dispositions.
3. Answers. In the reverse, under State v. Melendez, criminal attorney cannot use any answer because of the 5th amendment right of defendant.

Dispositions in civil forfeiture include:

1. Default judgments. Defaults are granted when claimants fail to file an answer or file a stay, they have to file some type of responsive document. Please note that defaults are easily vacated in a year, after a year typically need to show good cause. Also, please note that any person who could not with due diligence have discovered that property was seized as contraband can file a claim for its return or the value thereof within 3 years of the seizure (which is why we double check and notice any possible claimant). For these reasons, we hold assets subject to default judgments for minimum of one year and typically for pendency of criminal case.
2. Consent judgments. These are entered after negotiations and with consent of both parties. They can include partial returns of assets.
3. Final judgments. Entered after judicial finding that state proved its case by a preponderance of the evidence.

Two common defenses are:

1. Innocent owners. These are claimants who are not charged. Some claimants may be lease holders or mortgage holders, which we can return or split an asset with. But, for some other claimants, we have to look at a totality of circumstances. For example, we may choose to litigate where a criminal defendant purchased the asset but put in a family members name, or where a criminal defendant had exclusive use of an asset that is titled or listed in another individual's name. But when there is a true innocent owner, we try to return as quickly as possible. We don't have to wait for any type of filing or judicial approval.
2. Legitimate income. If we can avoid seizing an asset related to legitimate income, we will do so. But, sometimes, there is comingling within an account that made it difficult for our investigators to identify for us. Or there were earnings that were not reported and taxed so hard for our investigators to verify. And in those cases, we need to work with taxation and labor departments.

CONVICTION REQUIREMENTS

Recent statutory change may impact on the final disposition of civil forfeitures. Previously, the forfeiture statute did not require a criminal conviction. That was changed in January 2020, when NJ became the 16th state to impose conviction thresholds.

Some key points regarding the amended forfeiture statute:

1. Thresholds. Thresholds were placed into the forfeiture statute. Prosecutors will have to return seizures of less than \$1,000 in cash or property valued at or below \$10,000 if prosecutors fail to bring charges or dismiss.
2. Definition of dismissal. Please note that this does not include dismissals related to diversionary programs. These dismissals were not because of lack of evidence, but after a prosecution was pursued. Initial drafts of bills were unclear and subsequently amended to clarify this point.
3. No claimant. Please note that this does not apply to cases where a claimant is not identified. The reasoning behind this is some assets cannot be tied to a claimant. Example is bulk currency that is seized in transit, such as on a tractor trailer or a shipped package where a fictitious identify was used.

Some considerations for assessing the impact of the amended forfeiture statute:

1. Data before amendment. It was anticipated from data collected by the Institute for Justice between 2014-2018 and a study by the ACLU of NJ that these thresholds would account for more than half of the actions for monetary seizures and 90% of vehicle seizures.
2. Data after amendment. Statewide data will be difficult at this time, COVID has had a tremendous impact in law enforcement and seizures have been extremely low overall.

May be some time before we can truly assess. Post-COVID we will also have new reporting requirements which will discuss in a minute that will assist with this.

3. Practice. This amendment would certainly prevent abuses where not prosecuted. But, in both DCJ and GCPO programs, never saw a case where we forfeited an asset without a resulting conviction. If the matter was dismissed or not pursued with a prosecution, we returned the asset.

REPORTING REQUIREMENTS

Under N.J.S.A. 2C:64-11, a county prosecutor must compile and submit to the AG a quarterly report containing information pertaining to each seizure and forfeiture of funds or property by a law enforcement agency within the county. This includes any asset subject to county forfeiture, adoption, or joint task force.

The information statutorily required includes:

1. Specific information on each seizure of property
2. Disposition of any related criminal action
3. Information on forfeiture of the seized property
4. Information on the final disposition of forfeited property
5. Information on the estimated value of forfeited property
6. Whether it was a seizure adopted by a federal agency
7. Information on whether there was a claim filed or counterclaim
8. Whether the final forfeiture proceeding was criminal or civil
9. Whether there was a forfeiture settlement agreement
10. Date of forfeiture order
11. The purpose for which any property is used
12. Any other information required by AG

The working group on the reporting requirements essentially took these requirements, and we developed numerous fields of information that will be reported on. We will be requiring a substantial amount of information and tracking. And all this information must be made publically available in a searchable database. At this time, because of COVID, an executive order was entered delaying the effective date of reporting until after the state of emergency has passed.

Consequence for failing to file this report will be severe. That agency will have to automatically disgorge all of the property that was seized or forfeited in that quarter.

This reporting requirement is important. One of the main criticisms has been NJ's reporting. The Institute for Justice issued a 5-state forfeiture report. NJ's grades in the categories were generally good except for statewide forfeiture reports.

LEGAL REPRESENTATION

Private counsel will typically represent on both civil forfeiture and criminal charges. Problem is that the Office of Public Defender will not represent on the civil forfeiture. This is problematic because our most indigent will often self-represent. It is a potential area for improvement, although some considerations offset:

1. The enhanced notices after Melendez case do make it clear that a stay is a responsive filing, so not faced with 5th amendment conflict and do not have to answer.
2. And when answers are filed without subsequent stays, the state will typically request the stay.
3. Also, if there is a default, the general practice was to hold the asset for a minimum of a year and/or resolution of the criminal case. This is especially true in matters below the new monetary thresholds for convictions.

Safe Streets Second Chances

DATE: September 3, 2020
FROM: John Koufos, Iveta Stefancova and Lacey White¹ (Right on Crime)
TO: Ivy Davis, U.S. Commission on Civil Rights
RE: Criminal Asset Forfeiture in New Jersey

Please accept this memo in advance of my (John Koufos) testimony before the U.S. Commission on Civil Rights. I intend to focus my testimony on the effect of forfeiture on people exiting incarceration and otherwise involved in the reentry process. Forfeiture is an important component of a broader range of financial penalties and collateral consequences that uniquely affect the reentry population. These issues range from fines and fees (which become arrest warrants), to housing, food, and living costs and present a primary barrier to reentry.

Overview

Criminal asset forfeiture occurs when assets or property are confiscated by the state and targets a person after being convicted of an underlying criminal offense. It includes property obtained before, during, or after the criminal activity, if no other legitimate source exists.² In other words, the property will be presumed forfeitable if the government proves that the property was acquired during the time of the violation (or within a reasonable time after) and there was not a lawful source for such property.³

Civil asset forfeiture is an in personam action against the defendant as part of criminal prosecution. A person's illegal assets can be seized or frozen by the government, and then after a conviction or guilty plea, a forfeiture order is meted out during the sentencing of the defendant. This distinguishes it from civil asset forfeiture which is a in rem action against the property, not dependent on criminal prosecution.⁴ In civil asset forfeiture, the property can be seized even if the person is not charged or convicted of a crime.⁵ As such, the property subject to forfeiture is the defendant, and defenses against the forfeiture can be brought only by third parties, who must intervene.⁶

Criminal asset forfeiture is considered a broader and more powerful tool of law enforcement than civil asset forfeiture. For example, the court in a criminal forfeiture case can order the defendant to pay a money judgment or to forfeit substitute assets, if the directly forfeitable property has

¹ John Koufos is the National Director of Reentry Initiatives at Right On Crime, and Executive Director of the [Safe Streets & Second Chances](#) (S3C) project. Iveta Stefancova is a Policy Analyst at ROC and Lacey White is the S3C Program Manager. I thank Ms. Stefancova and Ms. White for their preparation of this document.

² Civil and Criminal Forfeiture Law Defense From Government Seizures.
<https://www.cornerstonelegalgroup.com/practice-areas/civil-rights-violations-police-misconduct/civil-and-criminal-forfeiture-law-defense/>

³ 21 U.S.C. § 853(d).

⁴ Seizing Crime Proceeds and Compensating Victims. (January 17, 2017).

<https://www.fbi.gov/news/stories/forfeiture-as-an-effective-law-enforcement-tool>

⁵ Teigen, A & Bragg, L. (February 2018). Evolving Civil Asset Forfeiture Laws. Vol.26(5).

<https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx>

⁶ Asset Forfeiture. (November 2007) Vol.55(6).

<https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf>

Safe Streets Second Chances

been disposed of or cannot be found. This cannot happen in a civil forfeiture since it is against a specific property.⁷

Criminal asset forfeiture is an element of the defendant's sentence and not the underlying offense. Hence, it is an additional punishment imposed above a fine or imprisonment.⁸ For criminal forfeitures, the evidentiary standard is “beyond a reasonable doubt.”⁹ In criminal asset forfeiture, the government must demonstrate in court that the property owner obtained his property illegally.¹⁰

Criminal asset forfeiture is the most advantageous proceeding for the government because its process is more efficient, the government is permitted to seek substitute assets, and the government does not need to contend with an “innocent owner” defense. Additionally, it is simpler because the forfeiture proceeding is attached to the criminal proceeding.¹¹

Criminal forfeiture is commonly associated with specific types of criminal activity including:¹²

- Drug-related crimes
- Terrorist activities
- Crimes involving the storage and manufacture of illegal guns
- Warehouse activity involving counterfeit products
- Violations involving patented or copyrighted goods
- Various other types of criminal activity

History

Modern forfeiture laws were created with the intention to address organized crime (mainly drug trafficking) in the country and cut the funding for criminal kingpins. Lawmakers created a financial incentive for policing agencies to prioritize anti-drug law enforcement. The Racketeer Influenced and Corrupt Organizations (RICO Act) enacted the first criminal forfeiture statute and established that a convicted defendant forfeited to the government any interest acquired through racketeering activity, and any property right obtained through RICO activities.¹³ Similar federal and state legislation was subsequently enacted, authorizing criminal forfeiture as punishment for various crimes.¹⁴

Federal Equitable Sharing Program

⁷ Ibid.

⁸ Forfeiture. <https://law.jrank.org/pages/1230/Forfeiture-distinction-between-criminal-civil-forfeiture.html>

⁹ Gius, M. (Spring 2018). *The Effects of Civil and Criminal Forfeitures on Drug-Related Arrests*. Vol.15(1). http://www.cjcj.org/uploads/cjcj/documents/the_effects_of_civil_and_criminal_forfeitures_on_drug_related_arrests.pdf

¹⁰ Williams et al. (March 2010). Policing for Profit. https://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf

¹¹ SharedHope International Memorandum. (July 30, 2012). http://sharedhope.org/wp-content/uploads/2012/11/Asset-Forfeiture-Memo_Aug12.pdf

¹² Criminal Asset Forfeiture. <https://www.legalmatch.com/law-library/article/what-is-criminal-asset-forfeiture.html>

¹³ 18 U.S.C. §1963(a)(1976)

¹⁴ SharedHope International Memorandum. (July 30, 2012). http://sharedhope.org/wp-content/uploads/2012/11/Asset-Forfeiture-Memo_Aug12.pdf

Safe Streets Second Chances

Equitable sharing is a federal program that provides financial incentives to state and local law enforcement to engage in asset forfeiture. Specifically, federal law authorizes the Attorney General to share a federally forfeited property with participating state and local law enforcement agencies. Through equitable sharing, any state or local law enforcement agency that directly participates in a law enforcement effort that results in a federal forfeiture may either request to put tangible forfeited property into official use or an equitable share of the net proceeds of the forfeiture.¹⁵

Arguments for and against asset forfeitures

For	Against
It removes profit from the crime. ¹⁶	It denies property owners basic due process rights. ¹⁷
It makes funds available for restitution to the victims. ¹⁸	It gives law enforcement a financial stake in civil forfeiture which can distort their priorities and encourage the pursuit of property over the administration of justice. ¹⁹
It helps dismantle criminal organizations and takes away the tools or instruments they use to commit their crimes, and also takes away the funds they use to operate. ²⁰	It can lead to the unjust seizure of property from innocent people.
It is a deterrent to others who might be considering criminal activities. ²¹	

Problems

- Many low-income individuals, including returning citizens, cannot meet the burdens of forfeiture proceedings and often do not challenge seizures of their property. Mainly in

¹⁵ What is Equitable Sharing? <https://www.atf.gov/asset-forfeiture/qa/what-equitable-sharing>

¹⁶ Asset Forfeiture. (November 2007) Vol.55(6).

<https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf>

¹⁷ Teigen, A & Bragg, L. (February 2018). Evolving Civil Asset Forfeiture Laws. Vol.26(5).

<https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx>

¹⁸ Asset Forfeiture. (November 2007) Vol.55(6).

<https://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf>

¹⁹ Teigen, A & Bragg, L. (February 2018). Evolving Civil Asset Forfeiture Laws. Vol.26(5).

<https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx>

²⁰ Seizing Crime Proceeds and Compensating Victims. (January 17, 2017).

<https://www.fbi.gov/news/stories/forfeiture-as-an-effective-law-enforcement-tool#:~:text=Why%20use%20forfeiture%20at%20all,funds%20they%20use%20to%20operate.>

²¹ Ibid.

Safe Streets Second Chances

cases when the administrative costs, time, and other related expenses greatly exceed the value of the property. Hence, the government often obtains the property by default.²²

- Criminal asset forfeiture rules are unfair to defendants and third parties. The proceedings are easier and less protective of property owners than civil forfeiture proceedings. In addition, court decisions have modified criminal forfeiture procedures in ways that unfairly favor the government.²³
- In some areas, forfeitures have become a major revenue source for local police and prosecutors. This creates an additional incentive for law enforcement agencies to exploit the new funding stream. Additionally, it increases mistrust towards police, negatively impacts the due process, and suffers from a lack of transparency.²⁴
- The factual nexus element of criminal asset forfeiture is quite vague and lacks a coherent standard that allows courts to determine whether a property is subject to forfeiture.²⁵ The problem is that courts take different approaches to the factual nexus element based on the language of the authorizing statute and do not uniformly adopt any of the approaches to the factual nexus element. As such, under the same statute authorizing forfeiture, defendants in some jurisdictions lose their property while defendants in other jurisdictions do not. None of the existing approaches is able to meaningfully differentiate property that is sufficiently connected with crime to warrant forfeiture from property that is not.²⁶
- If the defendant was already convicted and sentenced, then a criminal forfeiture could constitute a second punishment and activate double jeopardy.²⁷
- Information about forfeitures is not widely available to the public and no uniform reporting requirements for forfeiture data exist. State standards that do exist are often incomplete and vague.²⁸

Criminal Asset Forfeiture Defense and Proceedings

Modern criminal forfeitures are governed by Federal Rule of Criminal Procedure 32.2. In criminal asset forfeiture proceedings, the court determines whether the defendant's property is subject to forfeiture.²⁹ As part of the process, the government must either establish that the property sought to be forfeited was used in criminal activity or the government may establish that property is forfeitable because it constitutes or is derived from any proceeds that the person

²² Williams et al. (March 2010). Policing for Profit.

https://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf

²³ Smart on Crime. (2011) The Constitution Project. https://archive.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf

²⁴ Jacobs, S. (May 19, 2020). Policing For Profit: How Civil Asset Forfeiture Has Perverted American Law Enforcement. <https://tenthamentcenter.com/2020/05/19/policing-for-profit-how-civil-asset-forfeiture-has-pervorted-american-law-enforcement/>

²⁵ Gilling, B. Nexus Rethought: Toward a Rational Factual Standard for Federal Criminal Forfeitures. <https://ilr.law.uiowa.edu/print/volume-102-issue-1/nexus-rethought-toward-a-rational-factual-standard-for-federal-criminal-forfeitures/>

²⁶ Ibid.

²⁷ Criminal Forfeiture. <https://www.legalmatch.com/law-library/article/criminal-forfeiture.html>

²⁸ Civil asset forfeiture: Unfair, undemocratic, and un-American. (October 30, 2017).

<https://www.splcenter.org/20171030/civil-asset-forfeiture-unfair-undemocratic-and-un-american>

²⁹ Fed. R. Crim. P. 32.2(a)

Safe Streets Second Chances

obtained from the crime. A third party seeking to assert an interest in those assets may not contest the criminal forfeiture allegation in the forfeiture proceeding itself since only the criminal defendant can do that.³⁰

After the conviction of the defendant and after it has met its burden of establishing forfeitability through the preponderance of evidence, the government may elect to seek either confiscation of forfeitable property or a money judgment in the amount of its value. If the government seeks confiscation, the court must determine whether the statutory nexus between the property and the crime of conviction exists.³¹

On the other hand, if the government seeks a money judgment, the court must determine the amount the defendant must pay. At that point, the court issues a preliminary forfeiture order or order for a money judgment against the defendant in favor of the government. Upon the issuance of a preliminary forfeiture order, the government must proclaim its intent to dispose of the property and notify any third parties known to have an interest in the property. Third parties with a legal interest in the forfeited property, other than the defendant, are then entitled to a judicial hearing, provided they file a timely petition asserting their claims. When the government is awarded a money judgment, it is not limited to the forfeitable assets the defendant has on hand at the time but may enforce the judgment against future assets as well.³²

If the defendant was prosecuted in a state case, then the federal forfeiture has to be civil, because there is no federal prosecution for the criminal offense. In a case when a defendant is prosecuted for one crime, but the property was involved in a related but separate crime, the forfeiture has to be civil, because the criminal forfeiture is limited to the offense of conviction. For example, drug proceeds seized from a defendant at the time of his arrest must be forfeited civilly if the defendant is charged with possession of drugs with intent to distribute. The reasoning is that because such money was part of the proceeds of earlier drug distribution and it was not the one for which the defendant is actually prosecuted.³³

What can the defendants do?

- Unlike civil asset forfeiture, criminal asset forfeiture often provides the right to an attorney and due process protections.³⁴
- A defendant can challenge the amount of criminal or civil forfeiture as a violation of the Eighth Amendment to the US Constitution, which restricts the government's ability to impose 'excessive fines' as punishment.³⁵

³⁰ Phelps, K.B. (June 30, 2012). What Do You Do When the Feds Come For Your Assets? Third-Party Claims in Forfeiture Proceedings. https://www.americanbar.org/groups/business_law/publications/blt/2012/06/04_phelps/

³¹ Fed. R. Crim. P. 32.2(b)(4)

³² Doyle, S. (January 22, 2015). Crime and Forfeiture: In Short. <https://fas.org/sgp/crs/misc/RS22005.pdf>

³³ Casella, S. (May 1, 1997). Forfeiture is Reasonable, and It Works.

<https://fedsoc.org/commentary/publications/forfeiture-is-reasonable-and-it-works>

³⁴ Rollins, K. (October 28, 2019). "Due Process Demands More than This." – South Carolina Court Finds State's Asset Forfeiture Regime Unconstitutional. <https://nclalegal.org/2019/10/due-process-demands-more-than-this-south-carolina-court-finds-states-asset-forfeiture-regime-unconstitutional/>

³⁵ Seddon et al. (2018) The Practitioner's Guide to Global Investigations. <https://www.cadwalader.com/uploads/books/a812bf96a5f3c6a5f998775d22d180d4.pdf>

Safe Streets Second Chances

- When a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.³⁶
- In any plea agreement, a defendant may only consent to the forfeiture of his or her interest in the property. A settlement that purports to forfeit the property may only bind the parties to it and transfers only that interest which the defendant possesses.³⁷
- The most significant limitations on forfeitures are based on procedure rather than individual rights. The federal government is required to send the owner of the property notice.³⁸

Racial Ramifications

Low-income individuals and communities of color are hit hardest by asset forfeitures. Mainly civil asset forfeiture laws are misused against people of color in cases in which there is no evidence of criminal activity.³⁹ The burden of recovering the property is on the owner who must prove that it was obtained legally. Thus, it is up to the person to fight the claim which is a burdensome and time-consuming process that is hard to navigate.⁴⁰ Furthermore, individuals struggle to pay costs associated with regaining their property and go through complicated legal proceedings that are heavily weighted in favor of law enforcement.⁴¹ Law enforcement also benefits from the fact that it assumes that these communities are not able to marshal resources to fight back and engage in further legal battles.

Although asset forfeiture is aimed to penalize transnational organized criminals and kingpins, it ends up harming minorities. This is most notable in racial profiling schemes when law enforcement decides whose assets to seize.⁴² For instance, Black and/or Hispanic drivers are over-represented in those pulled over and subsequently searched for contraband.⁴³ Law enforcement rather conducts traffic stops to search for drugs and drug proceeds because it is cheaper than developing leads and building cases against large drug organizations.⁴⁴

³⁶ Fed. R. Crim. P. 32.2(d)

³⁷ 9-113,420 Criminal Forfeiture Settlement Procedures. <https://www.justice.gov/jm/jm-9-113000-forfeiture-settlements#9-113.420>

³⁸ Criminal Forfeiture. <https://www.legalmatch.com/law-library/article/criminal-forfeiture.html>

³⁹ Cockburn, C. (February 3, 2010). Easy Money: Civil Asset Forfeiture Abuse by Police. <https://www.aclu.org/blog/criminal-law-reform/reforming-police/easy-money-civil-asset-forfeiture-abuse-police>

⁴⁰ Vallas et al. (April 2016). Forfeiting the American Dream. <https://cdn.americanprogress.org/wp-content/uploads/2016/04/01060039/CivilAssetForfeiture-reportv2.pdf>

⁴¹ Ibid.

⁴² Ciciora, P. (April 13, 2017). Are law enforcement agencies abusing civil asset forfeiture? <https://news.illinois.edu/view/6367/487451>

⁴³ Blanks, J. (July 20, 2017). Sessions' Civil Forfeiture Memo: It's Not Just the Money. <https://www.cato.org/blog/sessions-civil-forfeiture-memo-its-not-just-money>

⁴⁴ Ibid.

Safe Streets Second Chances

Seizures often take place in heavily policed, low-income communities where funding is tight.⁴⁵ This may increase the need to get additional funding and look for easy targets in these communities.

Reentry

Most returning citizens do not have the means and resources to fight asset forfeitures. They already struggle to reintegrate and experience financial insecurity. Thus, asset forfeitures are cutting assets from struggling returning citizens and families and driving them deeper into poverty. Seizures of cash, vehicles, and homes through asset forfeiture risk undercut the government's own efforts to help people experiencing poverty and ensure public safety.⁴⁶ Moreover, seizing homes puts people at risk of homelessness which can contribute to poorer health outcomes and pose challenges for applying for public benefits.⁴⁷ This ultimately increases the chances of reoffending. Last but not least, requiring payment of a cash bond in order to challenge a forfeiture creates another barrier for formerly incarcerated individuals. This creates a vicious cycle that is an impediment to successful reentry.

New Jersey Landscape

Forfeiture Actions

In New Jersey, the racial disparities within the criminal justice system are prevalent.⁴⁸ This is also related to civil asset forfeitures that disproportionately harm people of color. Every county in New Jersey relies on them⁴⁹ and the process has been known for the lack of transparency, accountability, and justice. Civil asset forfeiture laws created incentives for law enforcement to over-enforce crimes that carry the possibility of forfeiture, most predominantly drug offenses, to the neglect of other public safety objectives.⁵⁰

In New Jersey, a large number of seizures tend to concentrate in heavily policed, urban, and low-income communities as shown on the [map](#) developed by the American Civil Liberties Union of New Jersey (ACLU-NJ). Around \$5.5 million was seized, and 343 cars were seized from January to March 2016 in New Jersey.⁵¹ ACLU-NJ also reported that Hudson county made over 400 seizures in five months and about half were less than \$175.⁵²

⁴⁵ Civil asset forfeiture: Unfair, undemocratic, and un-American. (October 30, 2017).

<https://www.splcenter.org/20171030/civil-asset-forfeiture-unfair-undemocratic-and-un-american> ⁴⁶ Vallas et al. (April 2016). Forfeiting the American Dream. <https://cdn.americanprogress.org/wp-content/uploads/2016/04/01060039/CivilAssetForfeiture-reportv2.pdf>

⁴⁷ Housing and Homelessness as a Public Health Issue. (November 7, 2017). <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue>

⁴⁸ Criminal Justice Reform. <https://www.fundfornj.org/crossroadsnj/reports/criminal-justice-reform?page=1>

⁴⁹ ACLU-NJ Report Reveals Abuse and Overuse of Civil Asset Forfeiture in New Jersey. (December 11, 2018). <https://www.aclu-nj.org/news/2018/12/11/aclu-nj-report-reveals-abuse-and-overuse-civil-asset-forfeit>

⁵⁰ Scotti, R. & Newman, T. (February 7, 2019). New Jersey Committee Approves Package of Bills to Reform Civil Asset Forfeiture Laws. <https://www.drugpolicy.org/press-release/2019/02/new-jersey-committee-approves-package-bills-reform-civil-asset-forfeiture>

⁵¹ Private Property, Police Profit: Explaining and Reforming Civil Asset Forfeiture in New Jersey. https://www.aclu-nj.org/files/2215/4453/4434/2018_ACLU_Civil_Asset_Forfeiture.pdf

⁵² Ibid.

Safe Streets Second Chances

A report published in 2016 by the Institute for Justice graded New Jersey a D- for its asset forfeiture laws. New Jersey's civil forfeiture laws were considered as some of the worst in the country. The problem in New Jersey is that the government only needs to show by a preponderance of the evidence that the property was used in a crime. Innocent defendants bear the burden of proving that they had nothing to do with the alleged criminal use of their property. Furthermore, local law enforcement agencies can profit from it as they keep 100 percent of forfeiture proceeds. Additionally, New Jersey ranks 36th in utilizing equitable sharing.⁵³

Law enforcement regularly keeps contraband or seized goods from people convicted of crimes. In many instances, law enforcement agencies can also obtain money, high-end electronics and luxury cars through civil asset forfeiture. Prosecutors and police chiefs use this as an excuse to combat and deter criminal organizations with the added benefit of revenue for their agencies.⁵⁴ Law enforcement in New Jersey has been also relying on RICO, money laundering, and asset forfeiture statutes to prosecute various criminal syndicates in the state.⁵⁵

In New Jersey, the forfeiture law specifies the following property subject to seizure:⁵⁶

- Any proceeds from illegal activity, such as cash from drug dealing or proceeds of illegal gambling
- Property that is integral to the illicit act
- Property used in committing a crime, such as an automobile used to transport illegal drugs
- Controlled dangerous substances, firearms which are unlawfully possessed, carried, acquired or used, illegally possessed gambling devices, untaxed or otherwise contraband cigarettes or tobacco products, untaxed special fuel, unlawful sound recordings and audiovisual works and items bearing a counterfeit mark

Recent Legislation

New Jersey has been working towards advancing asset forfeiture reforms. In January 2020, New Jersey passed some legislation in regard to asset forfeiture.

- [S1963](#) mandating comprehensive disclosure and transparency requirements. The bill requires county prosecutors to compile and submit to the Attorney General quarterly reports concerning asset seizure and forfeiture by law enforcement agencies within that county. The bill also requires reporting the amount of forfeiture funds received or the value of forfeited property by law enforcement agencies in the county, federal agencies, or joint task forces.⁵⁷
- [A4970](#) revising procedures for certain asset forfeiture proceedings and requiring a criminal conviction before civil forfeiture.

⁵³ Policing for Profit 2nd Edition. (2016). <https://ij.org/pfp-state-pages/pfp-new-jersey/>

⁵⁴ Sullivan, S.P. (November 14, 2015). N.J. laws allowing cops to seize assets among 'worst in country,' report finds. https://www.nj.com/politics/2015/11/nj_cops_seize_millions_a_year_re.html

⁵⁵ Finklea, K. (April 16, 2009). Organized Crime in the United States: Trends and Issues for Congress. <file:///C:/Users/istefancova/Downloads/37133.pdf>

⁵⁶ N.J.S.A. 2C:64-1

⁵⁷ An Act concerning asset forfeiture and supplementing Title 2C of the New Jersey Statutes.

Ways to Improve the System

- Reform due process with extending the right to counsel and require a stricter burden of proof for the state government. It is crucial that innocent property owners do not have property seized and forfeited without due process.⁵⁸
- Provide statutory change to raise the burden of proof on the government to minimize the frequent application of forfeiture proceedings.⁵⁹
- Change the ways seized funds are allocated and not allowing law enforcement to obtain 100 percent of the proceeds. For instance, move some funds from drug offense proceeds to other areas that actually promote public safety such as substance abuse programs, diversion programs, and supportive housing.
- Abolish civil asset forfeiture entirely as was done in Nebraska and New Mexico.⁶⁰
- On the federal level, end equitable sharing program to discourage circumventing state laws and abuse of funds.⁶¹

⁵⁸ Sitrin, C. (December 13, 2018). Decrying It as ‘Policing for Profit,’ Critics Want Reform of NJ’s Civil Asset Forfeiture. https://www.njspotlight.com/2018/12/18-12-12-decrying-it-as-policing-for-profit-critics-want-reform-of-civil-asset-forfeiture-in-nj/?utm_source=NJ+Spotlight++Master+List&utm_campaign=1b3d98dd6c-EMAIL_CAMPAIGN_2018_12_13&utm_medium=email&utm_term=0_1d26f473a7-1b3d98dd6c-398669430&mc_cid=1b3d98dd6c&mc_eid=d671408d81

⁵⁹ Suarez, L. (June 1, 2019). *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*. Vol.5(3). <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1104&context=journal-of-property-law>

⁶⁰ Townes, C. (July 27, 2017). How to End Civil Forfeiture. <https://slate.com/news-and-politics/2017/07/how-nebraska-and-new-mexico-banned-civil-forfeiture.html>

⁶¹ Policing for Profit 2nd Edition. (2016). <https://ij.org/pfp-state-pages/pfp-new-jersey/>

PREPARED MEMORANDUM
OF
NATHAN W. LINK
Submitted to the
The New Jersey Advisory Committee
To
The U.S. Commission on Civil Rights
For
Overview Panel on Collateral Consequences of Criminal Asset Forfeiture

Monday, September 21, 2020

(3:00 pm – 4:30 pm)

Please accept this memorandum in advance of my testimony before the New Jersey Advisory Committee to the U.S. Commission on Civil Rights. I focus my remarks squarely on the social scientific research on the impacts of fines, fees, forfeiture, and other monetary sanctions on people involved with the criminal legal system, including those in the prison reentry process. I also discuss the community-level impact of an increased emphasis on the collection of financial sanctions, the intersection of financial sanctions and race/ethnicity, and I conclude with a brief summary of promising legal and policy reforms.

Overview Panel on Collateral Consequences of Criminal Asset Forfeiture

Good afternoon, thank you to the committee and organizers of this panel for including me in the discussion, and I hope everyone and their families are healthy. I am a criminologist and I study monetary sanctions and other legal financial obligations (LFOs) with an emphasis on the impact it has on those navigating the prisoner reentry process. Currently, with colleagues Jordan Hyatt and Kathleen Powell of Drexel University, I have been studying fines, fees, and debt across Pennsylvania as part of the multi-state Community Corrections Fines and Fees Study (<http://ccffstudy.org/>). I will use my ten minutes to convey the state of the social science research as faithfully as possible.

Before I jump into the studies, I want to make a few general points about the empirical literature. (1) It is underdeveloped. We simply do not have nearly enough research—especially quantitative studies—on the nature of fines, fees, and other LFOs and their effects across a range of places. This is especially true for women and juveniles, who may be affected by debt differently than men. As a result, some of our knowledge in this area derives from journalistic accounts and anecdotal reports. Part of the reason for the small amount of research is because there are thousands of local and county systems of criminal justice across the U.S. Because of this structure, the policies and practices surrounding the imposition, collection, and enforcement of fines and fees vary dramatically depending on where you look. (2) Most of the work I will review focuses on fines, fees, restitution, and other monetary sanctions associated with criminal proceedings. Researchers have paid more attention to these than to the impact of forfeiture on reentry, perhaps because they are commonly and zealously employed (see Appendix A). In fact, a majority of prisoners owe debt related to financial sanctions (Harris, Evans, & Beckett 2011). That said, the stressful and consequential impacts of fines and fees may be similar to that of forfeiture, so the lessons of the fines and fees studies may be useful to this committee.

I organize my discussion along three key dimensions: (1) the impact of monetary sanctions and debt on individuals and families; (2) their ability to prolong justice system contact and cause recidivism; and (3) their intersection with race and racism.

Impacts on Individuals and Families

Financial Stress, Poverty, and Mental Health

Fines, fees, and other financial obligations are a source of stress that exacerbate the already tumultuous prison/jail reentry transition. In one study, 64% of their subjects found their debts to be “very” or “quite” stressful (Martire et al. 2011). Increased poverty brought on by financial sanctions can cause people to forgo basic necessities such as shelter, food, utilities payments, childcare needs, and medicine (Cook 2014; Harris 2016). Mark Pogrebin and others (2014) found in Colorado that even for former prisoners who were lucky enough to find employment after prison, it did not produce enough income to overcome their financial obligations. Moreover, through high interest rates, late fees, and damaged credit, they can bring about permanent, long-term debt and poverty (Harris 2016; Harris, Evans, and Beckett 2010).

Extensive research in medical sociology and public health demonstrates that chronic stressors are linked to negative health outcomes, particularly poor mental health (Pearlin et al. 1981). Owing

debts is reported as a stressor of consequence, which may be especially pronounced within jurisdictions that respond to late or non-payment with harsh sanctions such as arrest (Cook 2014; Harris 2016). It leads to feelings of hopelessness, which can trigger substance abuse and other mental health problems during a time when former prisoners can least afford it (Arditti & Few 2006; Cook 2014; Harris 2016; Pogrebin et al. 2014).

Family Impacts

Financial obligations can cause strain and conflict among family members (Bannon, Nagrecha, and Diller 2010; Nagrecha, Katzenstein, and Davis 2015). Upon leaving prison, many people are required to pay back debts and take on new fees (e.g., supervision fees) despite not having any savings or meaningful income (Bannon et al. 2010; Pogrebin et al. 2014). Rather than risk facing the legal consequences of nonpayment, former prisoners may seek out family members—usually women, including mothers, grandmothers, sisters, and partners—to borrow money to pay off debts, or for other forms of financial assistance (Cook 2014; Katzenstein and Waller 2015; Western et al. 2015). Because many family members want to support their recently released family and do not want to see them reincarcerated for any reason, they provide financial or other forms of material support (i.e., housing, food, transportation, etc.). Families of the formerly incarcerated are often not wealthy themselves, making it a challenge to bear this additional financial burden (Nagrecha et al. 2015; Pettit and Western 2004). Because of these dynamics, former prisoners and their families have reported relying on high interest, predatory pay-day lenders (Cook 2014).

Mitali Nagrecha and colleagues (2015) investigated the role of criminal justice debt in reentry in New York and New Jersey and found that former prisoners were unable to juggle the debt burdens required of them, and, as a result, were heavily reliant on family members for cash and other forms of instrumental support. Harris, Evans, and Beckett's (2010) findings from Washington State revealed that respondents who paid off financial debts regularly were consequently less able to financially support their children. In sum, the body of this work shows that the adverse effects of fines, fees, and other financial sanctions reverberates through families in ways not visible to many.

Strained family relationships and conflict are serious problems worth studying and addressing in and of themselves. But family strain and conflict is also of concern to criminologists because multiple theoretical perspectives suggest family conflict leads to more problems—including substance abuse and recidivism, which I turn to now (Agnew 2006; Cullen 1994; Hirshi 1969; Laub & Sampson 2003).

Prolonged Justice System Involvement and Reoffending

Prolonged Justice System Involvement

Fines and fees and associated debt lead to increased involvement in the criminal justice system—such as extensions of community supervision (probation or parole) terms (Dewan 2015a; Nagrecha et al. 2015). Longer periods of probation/parole supervision as well as more intense supervision translate into a higher chance that the person will receive a probation/parole violation (Grattet et al. 2009; Grattet, Lin, and Petersilia 2011; Grattet and Lin 2016). In many places, late or nonpayment can result in serious consequences, ranging from driver's license suspension to arrest and reincarceration (Albin-Lackey 2014; American Civil Liberties Union 2010; Harris et al. 2010). The suspension of a driver's license can cause one to lose their job or limit potential employment opportunities, which is often a condition of probation/parole. As a result of these processes,

Vincent Shiraldi and Michael Jacobson (2014) argue that debt is “trip wire” back to prison.

A critical group of scholars argue that fines and fees lead to more entanglement with the legal system because of a revenue motive that favors keeping people tied to the system (Albin-Lackey 2014; Armstrong 2015; Dewan 2015b, 2015a; Katzenstein and Waller 2015; Logan and Wright 2014; U.S. Department of Justice 2015). This perspective suggests that fines and fees are not being used according to traditional penological aims, but are used by agencies to further enmesh certain groups in the justice system in order to advance their agencies’ and their own pecuniary interests. For example, in a scathing report from Louisiana, auditors concluded that monies from fees levied by criminal court judges were used to fund an account that paid for premium health insurance plans for court staff (Robertson, 2015). Katzenstein and Waller (2015) succinctly state this dynamic: “This system of [LFO] seizure levies tariffs on the mother, grandmother, partner, sister, daughter, or friend (mostly women) of the incarcerated poor (mostly men) to subsidize the carceral state” (p. 639).

Fines and Fees as Criminogenic (i.e., crime-causing)

A few criminological perspectives suggest that fines and fees lead to increased offending (Agnew 2006). A couple criminological theories highlight the crime-controlling effect of families (Cullen 1994; Hirschi 1969), and as I just said, fines and fees can damage relations within families. From the perspective of general strain theory (Agnew 2006), being required to pay what could amount to sizable monthly payments could act as a financial strain large enough to “push” or motivate people to offend, possibly in the form of revenue-generating or acquisitive crimes that can offset the effect of fines and fees (Hairston 2002).

Second, heavy dependence on fines/fees/forfeitures can theoretically lead to increased crime because it fosters the belief that the system is predatory and illegitimate. If former prisoners believe they are being unjustly squeezed for money and property, this can breed disrespect and hostility toward police and the criminal system as a whole. As a result, rather than relying on these institutions to address disputes, they may decide to handle matters using their own methods, which may include violence and other criminal behavior.

Third, if debt collection tactics including wage garnishment are based on traceable income from legitimate employment, it is possible that having debt could incentivize people to explore revenue-generating activities in the underground, possibly illicit economy (Beckett and Harris 2011; Cook 2014; Kotloff 2005; Link and Roman 2017). As such, from a rational choice theoretical model, it is likely that some debtors would prefer to work off-the-books in order to avoid revenue detection and coerced payment.

Finally, fines/fees and recidivism might be mediated over time by other factors, meaning debt leads to crime via some cause that intervenes the two. For example, criminal justice debt can appear in criminal history checks and credit reports accessed by landlords (Beckett and Harris 2011). It can lead to a loss of a driver’s license or the inability to secure a loan for education or open a bank account (Bannon et al. 2010). Further, in many areas criminal records cannot be expunged if the person has outstanding criminal justice debt (Harris et al. 2010; Vallas & Patel 2012), and so financial debt can prolong the stigma of a criminal record, challenging the employment search

(Pager, 2007). All of these issues may indirectly increase the likelihood that the person returns to crime.

Looking at the studies, 13% of respondents in Martire and colleagues' (2011) study of former prisoners identified the repayment of debt obligations as the reason they committed their last acquisitive crime. Harris, Evans, and Beckett's (2010) respondents indicated that debt can create incentives that encourage the return to quick money, such as prostitution. In a descriptive report from Alabama, Cook (2014) showed that, of a sample of 928 people involved in the justice system across thirteen counties, 17% reported resorting to criminal activities to raise the revenue to pay off fines and fees. A large cohort study of juveniles found that those who were assessed financial penalties were more likely to be arrested or convicted of a new offense within a two-year period after their conviction (Piquero & Jennings 2017).

However, not all of the empirical studies, including some of my own, find this pattern. Gordon and Glaser (1991) did not find that financial sanctions increased recidivism in California. In Florida, researchers did not find that probationers who were assessed monetary sanctions in their sample were more likely to receive a probation violation; although, they did find a pattern whereby those with larger amounts of financial obligations tended to commit more serious probation violations (Iratzoqui and Metcalfe 2017).

Importantly, one big caveat to all of the above-mentioned studies is that they almost exclusively rely on observational data, not experiments or randomized controlled trials (RCTs) which are methodologically stronger. However, one study is forthcoming by the late Devah Pager and colleagues and leverages an RCT design. In Oklahoma, they took a sample of approximately 600 people convicted of misdemeanors and randomly assigned them to a treatment and control condition, in which the treatment participants had all of their debts automatically paid off. They then tracked all participants for one year and found that those in the treatment group were significantly less likely to receive new charges and convictions within the first few critical months of reentry, when risk of recidivism is notoriously high. However, the effect faded over time so that there were no recidivism differences between the two groups by the one-year mark (Pager et al. 2020).

In sum, the data suggest that financial burdens such as fines and fees are criminogenic in some cases. But as I mentioned earlier, the empirical work in this area is far underdeveloped, and my own view is that the research needs to become much more nuanced; it needs to tease out for whom debt is criminogenic, when, under what conditions, and in which places.

Race and Racism

Fines, fees, and forfeitures have varying impacts across race and ethnicity. Given their representation in the criminal justice system, Blacks and Hispanics and their families are more deeply impacted by America's heavy reliance on monetary sanctions and forfeitures (Harris 2016). The most recent Federal Reserve Report on the Economic Well-being of U.S. Households in 2019 included court-related debt for what I believe is the first time ever. Their analysis revealed that six percent of all adults in their sample reported that they or their family have unpaid legal expenses or court costs. The differences were starker across race/ethnicity, with 9% of Hispanics reporting

they or someone in their family have criminal justice related debt and it was 12% for African Americans.

Several individual-level studies found that Blacks and Hispanics are affected by fines and fees more than whites. Harris, Evans, and Beckett (2011) found that Hispanics were assessed greater amounts of monetary sanctions than whites. Furthermore, Black people living in counties with a large proportion of Black residents were assessed more than whites. Three studies from several states I have been involved with found that, while people of color did not appear to have significantly more debt from fines and fees immediately after their release from incarceration, they did owe significantly greater amounts as time went on (Link 2019; Link, Powell, Hyatt, & Ruhland 2020; Ward, Link, & Christy forthcoming). This suggests that fines and fees may initially be applied in a similar fashion across racial groups, yet they have longer term adverse impacts among people of color who may face difficulties with repayment. This dynamic may not be surprising given we know that people of color generally have less accumulated wealth, may live in concentrated poverty within segregated Black neighborhoods (Peterson & Krivo 2002), and are discriminated against in their employment search (Pager 2007).

The use of fines, fees, and other monetary sanctions have a collective impact that adversely affects entire communities, particularly communities of color. Similar to the Justice Department findings from Ferguson, the Vera Institute of Justice's study of bail, fines, and fees in New Orleans found that the criminal justice system operates in a way that transfers wealth from predominantly Black neighborhoods to government institutions and private companies, predominantly run by whites (Laisne, Wool, & Henrichson 2017).

Two political scientists used data from 9,000 U.S. cities and showed that the use of fines as a source of governmental revenue is A) prevalent across the country, and B) it is positively associated with the share of city residents who are Black. In other words, cities that rely more on revenue from fines are generally the cities that have larger proportions of African American residents. Interestingly, they also showed that this effect is moderated (i.e., mitigated), but not completely diminished, within cities that have Black representation on city council (Sances & You 2017).

Rebecca Goldstein and colleagues (2018) used data from 90,000 local governments and examined the association between governmental revenue from fines, fees, and forfeiture and police clearance rates for violent and property crimes (i.e., rates at which crimes are resolved by arrest). They found that police departments in cities that collect a greater proportion of their revenue from fines, fees, and forfeitures solve crimes at significantly lower rates. In short, when police are incentivized by financial considerations, they may respond in a rational manner by spending time on those revenue-raising activities at the expense of critical law enforcement responsibilities. These studies taken together suggest a double whammy effect on residents of some Black communities: the police and courts squeeze them for financial resources and at the same time serious public safety issues continue unabated. This phenomenon is related to the overpolicing/underpolicing paradox (see Leovy 2015).

Policy and Legal Reform Avenues

- Increase Black representation within government at local and other levels.
- Establish an “LFO Commission” as was done in Massachusetts.
 - Task them with taking an inventory of all fees, costs, fines, and forfeitures in NJ (see Link, Hyatt, & Ruhland 2020).
- Eliminate court fees and costs, which may require addressing fundamental funding issues. See San Francisco and Alameda counties as an example.
- Eliminate fees (including co-pays for medical/psychological treatment) wherever they arise, including jails and prisons and community corrections agencies.
- Ensure through data collection and analysis that fines are distributed fairly across people and places.
 - Explore the possibility of the Day Fine Model, which is seen as fairer and has already been subject to evaluations with positive results.
- Eliminate poverty penalties such as interest and late fees (see recommendations sections of Bannon et al 2010).
- Distinguish the types of monetary sanctions because some, such as fines, are more defensible than others and some, such as restitution, do not need reform in the same way.
- Increase the use of defensible and research-based ability to pay assessments, both at the court stage and in later stages when assessing fees (see Link, Hyatt, & Ruhland 2020)
 - Readminister the ability to pay assessment periodically given that financial circumstances are dynamic.
- Increase the use of bench cards summarizing the use of ability to pay hearings/criteria and criteria for violations for non-payment.
- Include rank-and-file court staff and officers in reform discussions to minimize ground-level resistance (see Hyatt, Powell, & Link, forthcoming).
- Disconnect agency funding from the financial sanctions they assess and collect.
- Engage policymakers and the public with the idea that fines/fees/forfeitures bring about consequences that violate even the strict principles of retribution.

References


- Agnew, Robert. 2006. *Pressured into Crime: An Overview of General Strain Theory*. New York, NY: Oxford University Press.
- Albin-Lackey, Chris. 2014. *Profiting from Probation: America's "Offender-Funded" Probation Industry*.
- American Civil Liberties Union. 2010. *In for a Penny: The Rise of America's New Debtor's Prisons*.
- Armstrong, Ken. 2015. "The Woman Who Spent Six Years Fighting a Traffic Stop." *The Marshall Project*.
- Bannon, Alicia, Mitali Nagrecha, and Rebekah Diller. 2010. *Criminal Justice Debt: A Barrier to Reentry*.
- Beckett, Katherine and Alexes Harris. 2011. "On Cash and Conviction." *Criminology & Public Policy* 10(3):509–37.
- Cook, Foster. 2014. *The Burden of Criminal Justice Debt in Alabama*.
- Dewan, Shaila. 2015a. "Private Probation Company Accused of Abuses in Tennessee." *The New York Times*, October 1, A15.
- Dewan, Shaila. 2015b. "Surreptitious Video of a Judge's Threats Leads to Changes in a Georgia Town." *The New York Times*, A12.
- Grattet, Ryken and Jeffrey Lin. 2016. "Supervision Intensity and Parole Outcomes: A Competing Risks Approach to Criminal and Technical Parole Violations." *Justice Quarterly* 33(4):565–83.
- Grattet, Ryken, Jeffrey Lin, and Joan Petersilia. 2011. "Supervision Regimes, Risk, And Official Reactions To Parolee Deviance." *Criminology* 49(2):371–99.
- Grattet, Ryken, Joan Petersilia, Jeffrey Lin, and Marlene Beckman. 2009. "Parole Violations and Revocations in California: Analysis and Suggestions for Action." *Federal Probation* 73(1):1–11.
- Hairston, Creasie. 2002. "Fathers in Prison." *Marriage & Family Review* 32(3–4):111–35.
- Harris, Alexes. *A pound of flesh: Monetary sanctions as punishment for the poor*. Russell Sage Foundation, 2016.
- Harris, Alexes, Heather Evans, and Katherine Beckett. 2010. "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States." *American Journal of Sociology* 115(6):1753–99.
- Hyatt, Jordan, K. Powell, and N. Link. (forthcoming). Agency level perceptions of monetary sanctions: Current landscape and impediments to reform. *Sociological Perspectives*.
- Iratzoqui, A. and C. Metcalfe. 2017. "Set up for Failure? Examining the Influence of Monetary Sanctions on Probation Success." *Criminal Justice Policy Review* 28(4):370–93.
- Katzenstein, Mary F. and Maureen R. Waller. 2015. "Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources." *Perspectives on Politics* 13(03):638–56.
- Kotloff, Lauren J. 2005. "Leaving the Stree: Young Fathers from Hustling to Legitimate Work." *Public/Private Ventures*.
- Laub, John H. 2014. *Understanding Inequality and the Justice System Response: Charting a New Way Forward*. William T. Grant Foundation.

- Laub, John H. and Robert J. Sampson. 2003. *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*. Cambridge, MA: Harvard University Press.
- Link, Nathan W. "Criminal Justice Debt During the Prisoner Reintegration Process: Who Has It and How Much?." *Criminal Justice and Behavior* 46, no. 1 (2019): 154-172.
- Link, Nathan, Jordan M. Hyatt, and Ebony Ruhland. "Monetary Sanctions, Legal and Collateral Consequences, and Probation & Parole: Where Do We Go From Here?." *UCLA Criminal Justice Law Review* 4, no. 1 (2020).
- Link, Nathan W. and Caterina G. Roman. 2017. "Longitudinal Associations among Child Support Debt, Employment, and Recidivism after Prison." *The Sociological Quarterly* 58(1):140–60.
- Logan, Wayne A. and Ronald F. Wright. 2014. "Mercenary Criminal Justice." *University of Illinois Law Review* 4:1175–1226.
- Martire, Kristy, Sandra Sunjic, Libby Topp, and Devon Indig. 2011. "Financial Sanctions and the Justice System: Fine Debts among New South Wales Prisoners with a History of Problematic Substance Use." *Australian & New Zealand Journal of Criminology* 44(2):258–71.
- Mossakowski, Krysia N. 2013. "Disadvantaged Family Background and Depression among Young Adults in the United States: The Roles of Chronic Stress and Self-Esteem." *Stress and Health* 62:52–62.
- Nagrecha, Mitali, Mary F. Katzenstein, and Estelle Davis. 2015. *When All Else Fails, Fining the Family*.
- Pager, Devah. 2007. *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago, IL: University of Chicago Press.
- Pearlin, Leonard I., Elizabeth G. Menaghan, Morton A. Lieberman, and Joseph T. Mullan. 1981. "The Stress Process." *Journal of Health and Social Behavior* 22(4):337–56.
- Pettit, Becky and Bruce Western. 2004. "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration." *American Sociological Review* 69(2):151–69.
- Piquero, A. R. and W. G. Jennings. 2017. "Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders." *Youth Violence and Juvenile Justice* 15(3):325–40.
- Pogrebin, M., M. West-Smith, A. Walker, and N. P. Unnithan. 2014. "Employment Isn't Enough: Financial Obstacles Experienced by Ex-Prisoners during the Reentry Process." *Criminal Justice Review* 39(4):394–410.
- Robertson, Campbell. 2015. "Suit Alleges 'Scheme' in Criminal Costs Borne by New Orleans's Poor." *The New York Times*, A14.
- Sampson, Robert J. and John H. Laub. 1995. *Crime in the Making: Pathways and Turning Points through Life*. Cambridge: Harvard University Press.
- Schiraldi, Vincent and Michael Jacobson. 2014. "Could Less Be More When It Comes to Probation Supervision?" *American City & County*, June 12.
- U.S. Department of Justice. 2015. *Investigation of the Ferguson Police Department*.
- Vallas, Rebecca and Roopal Patel. 2012. "Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing out of Poverty." *Clearinghouse Review* 46(3–4):131–41.
- Ward, Jeffrey, N. Link, and A. Christy (forthcoming). *Fines and Fees in Pennsylvania*. ACLU of Pennsylvania.
- Western, Bruce, Anthony Braga, Jaclyn Davis, and Catherine Sirois. 2015. "Stress and Hardship after Prison." *American Journal of Sociology* 120(5):1512–47.

Appendix A. Docket Sheet Example from Cambria County, PA.

Source: Brennan Center for Justice at NYU, at:

https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf

COURT OF COMMON PLEAS OF CAMBRIA COUNTY					
DOCKET					
		Docket Number: [REDACTED]			
		CRIMINAL DOCKET Court Case			
Commonwealth of Pennsylvania		Page 7 of 8			
v. [REDACTED]					
CASE FINANCIAL INFORMATION					
Last Payment Date:		Total of Last Payment: \$0.00			
[REDACTED]	<u>Assessment</u>	<u>Payments</u>	<u>Adjustments</u>	<u>Non Monetary Payments</u>	<u>Total</u>
Defendant					
Costs/Fees					
Automation Fee (Cambria)	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
Sheriff Costs (Cambria)	\$50.00	\$0.00	\$0.00	\$0.00	\$50.00
Postage Fee (Cambria)	\$8.00	\$0.00	\$0.00	\$0.00	\$8.00
Police Transport (Cambria)	\$100.00	\$0.00	\$0.00	\$0.00	\$100.00
CO/Drug Fee (Cambria)	\$200.00	\$0.00	\$0.00	\$0.00	\$200.00
Plea (Cambria)	\$94.71	\$0.00	\$0.00	\$0.00	\$94.71
CO/Drug Fee (Cambria)	\$200.00	\$0.00	\$0.00	\$0.00	\$200.00
Special Adm. (Cambria)	\$200.00	\$0.00	\$0.00	\$0.00	\$200.00
OSP (Cambria/State) (Act 35 of 1991)	\$345.00	\$0.00	\$0.00	\$0.00	\$345.00
OSP (Cambria/State) (Act 35 of 1991)	\$345.00	\$0.00	\$0.00	\$0.00	\$345.00
Service Charge (Cambria)	\$230.00	\$0.00	\$0.00	\$0.00	\$230.00
Judgment Fee (Cambria)	\$24.50	\$0.00	\$0.00	\$0.00	\$24.50
State Court Costs (Act 204 of 1976)	\$12.30	\$0.00	\$0.00	\$0.00	\$12.30
Commonwealth Cost - HB627 (Act 167 of 1992)	\$18.40	\$0.00	\$0.00	\$0.00	\$18.40
County Court Cost (Act 204 of 1976)	\$26.80	\$0.00	\$0.00	\$0.00	\$26.80
Crime Victims Compensation (Act 96 of 1984)	\$35.00	\$0.00	\$0.00	\$0.00	\$35.00
Domestic Violence Compensation (Act 44 of 1988)	\$10.00	\$0.00	\$0.00	\$0.00	\$10.00
Victim Witness Service (Act 111 of 1998)	\$25.00	\$0.00	\$0.00	\$0.00	\$25.00
Firearm Education and Training Fund (158 of 1994)	\$5.00	\$0.00	\$0.00	\$0.00	\$5.00
Substance Abuse Education (Cam) (Act 198 of 2002)	\$50.00	\$0.00	\$0.00	\$0.00	\$50.00
Substance Abuse Education (Cam) (Act 198 of 2002)	\$50.00	\$0.00	\$0.00	\$0.00	\$50.00
Judicial Computer Project	\$8.00	\$0.00	\$0.00	\$0.00	\$8.00
ATJ	\$2.00	\$0.00	\$0.00	\$0.00	\$2.00
Police Drug Fee (Cambria)	\$150.00	\$0.00	\$0.00	\$0.00	\$150.00
DNA Detection Fund (Act 185-2004)	\$250.00	\$0.00	\$0.00	\$0.00	\$250.00
Certification (Cambria)	\$20.20	\$0.00	\$0.00	\$0.00	\$20.20

AOPC 2220 - Rev 11/28/2009

Printed: 11/28/2009

This is an excerpt of a docket sheet from the Court of Common Pleas of Cambria County. This defendant was convicted under 35 PA. CONS. STAT ANN. § 780-113(30) (the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance). She was sentenced to a minimum of three months and a maximum of 23 months imprisonment, a fine of \$500, and restitution totaling \$325. Her total fees are \$2,464.91.

Follow-up Memorandum of Nathan Link

To the New Jersey Advisory Committee

To the U.S. Commission on Civil Rights

Wednesday, October 7, 2020

Thank you to the committee for seeking my participation on the panel centering on fines, fees, and forfeitures as collateral consequences in criminal justice. In addition to my submitted statement, I am submitting a couple other documents based on comments and questions from committee members. These are briefly summarized below:

1. A member asked about the cost-benefit aspect of forfeitures. The study I am submitting conducted by staff at the Brennan Center for Justice at NYU found that aggressively pursuing financial sanctions did not recoup that much revenue despite the amount of time, effort, and resources put into the effort.
2. A member asked about the study showing that reliance on financial sanctions in Black communities can be mitigated when there is Black representation on city council. I am also submitting the full text of this article.
3. A member asked about how law enforcement feels about financial sanctions and whether they are a barrier to reform. I am attaching a forthcoming article where my colleagues and I found that debt collection is not high on the list of priorities for probation and parole officers in particular. Instead, they prefer to spend their time on public safety matters. I believe they see debt collection as a necessary function because of underfunding, but would choose to spend their time differently if funded adequately.
4. With colleagues, I recently published an article in the UCLA Criminal Justice Law Review on the topic of financial sanctions among people on probation or parole. Some of its policy prescriptions may be of relevance to this committee so I am sharing a copy of the short article.
5. Last, I am attaching a study by Rebecca Goldstein and colleagues that I think is important as it found that police departments in cities that collect a greater proportion of their revenue from fines, fees, and forfeitures solve crimes at significantly lower rates. In short, when police are incentivized by financial considerations, they may respond in a rational manner by spending time on those revenue-raising activities at the expense of critical law enforcement responsibilities.

Again, it was a pleasure to participate and please do not hesitate if you have any follow-up questions or clarifications; I am glad to assist this committee in any way I can.

Best regards,
Nathan Link

Statement of Vincent J. Sanzone, Jr.
Before N.J. Advisory Committee to USCCR
Asset Forfeitures in New Jersey
November 17, 2020

I want to thank the civil rights commission for giving me this opportunity to express my views on this important topic regarding civil forfeiture in criminal cases in the State of New Jersey. My topic for discussion will be limited to the State of New Jersey forfeiture procedures and reform.

I am a criminal defense representing criminal defendants charged with local, state and federal crimes and have been doing so for the past 30 years. My office is located in Elizabeth, New Jersey, the fourth largest city in New Jersey.

I have handled criminal cases in almost every county in New Jersey, as well as federal cases in the Southern District of New York, Northern District of Ohio, District of Delaware, and Northern District of Virginia.

To characterize my practice and my client base I would say that the majority of the people that I represent are to a large extent economically disadvantaged, and have just enough income, to retain private counsel, but do not to qualify for the services of the public defender. In other words, the economic class that possess limited financial resources, and to a large extent can be characterized as "marginalized."

At the start I want to make it clear, and I think everyone would agree, that civil forfeiture has a legitimate purpose in our criminal justice system. Not only as a deterrent to criminal activity, but also as an important means to take away the illegal gains and profits from individuals engaged in criminal activity.

It is my opinion from my experience here in the State of New Jersey that many of our law enforcement agencies, in conjunction and in partnership with the county prosecutors, have been abusing the civil forfeiture laws and continue to do so to this day.

Pursuant to the New Jersey Attorney General Guidelines all property and currency that is obtained through civil forfeiture is shared by the law enforcement agencies involved in the

investigation and arrest of the defendant. Further, the county prosecutors get a share of the proceeds for filing the action in civil court and for pursuing the forfeiture through the courts.

The problem with the current civil forfeiture procedure in the State of New Jersey is that the law enforcement agencies, the local cities and towns in the state in which their police forces are making the arrests, are abusing the system to generate revenue. Stated differently, another way to fine or penalized the accused.

The system as practiced creates a perverse financial incentive for law enforcement to use the property, or cashed seized, to fund their department and to fund some of their pet projects. In is without argument that lower income defendants have little chance to get their property back because they do not have the resources to retain an attorney. That in short is the biggest problem.

Now when we talk about civil forfeiture in the law we are referring to derivative contraband," that is, property which "is itself innocent in nature, but has been used or is intended to be used in furtherance of an unlawful activity or is the proceeds of the illegal activities. This can be in the form for example an amount of U.S. Currency, and automobile, a home, boat, or anything that was obtained through the crime, or as a profit from the crime.

The two new NJ state laws (A4979) (S1963) which were signed into law in the beginning of this year, in my opinion, will bring some relief for some of the cases in which the forfeiture law is being pursued by local law enforcement agencies and county prosecutors. Although the new law brings some important changes it brings no relief in which the forfeiture law is being abused the most.

What do I mean by that?

For example, in drug cases, from my experience I find that the forfeiture proceedings are initiated by the county prosecutor in almost every case in which the charge of possession with intent to distribute along with possession is charged. Often when only a relatively small amount of CDS seized. I do not understand why the new law did not prohibit county prosecutors from seeking forfeiture for small amounts of U.S. Currency.

It might sound shocking but from my experience the amounts of money in which county prosecutors will seek forfeiture can be as low as several hundreds. With many forfeiture actions filed with sums of currency less than \$500.00.

The new law S1963 will at least now give us some empirical data because every county prosecutor must submit a quarterly report to the Attorney General which will specify specific information, among other data, on each seizure of property, which will include, among other things, the amount of funds or estimated value of the seized property.

Under this new law S1963 the Attorney General is required to have a public website which tracks forfeiture proceedings. However, unfortunately, to date, because of lack of state funds this website has not been created.

Also, because the defendants cannot afford forfeiture counsel many times the defendant can make an accounting as to how he or she legally obtained the U.S. Currency which has been seized. Often he can prove that the money was legitimately possessed by providing work pay stubs, savings account withdrawal slips, and other means; however, in many cases the defendants simply just surrendering the property by a default judgment because he or she neither has the means or money to fight the lawsuit filed by the county prosecutor.

Also, because it is extremely difficult for convicted felons to obtain hourly on-the-books employment, many are forced to except work from employers who pay them in cash. Accordingly, it is difficult or almost impossible for these individuals to present proof as to where the money was legally obtained. Therefore, we are talking about the forfeiture of someone's weekly salary that they were just paid.

Surprisingly, on many occasion, even when forfeiture proceedings are not filed within 90-days, the county prosecutor will condition the plea on the defendant forfeiting the U.S. Currency in his or her possession at the time of the arrest as a condition of the plea. When a defendant is faced with going to jail or receiving a harsh sentence, the defendant will undoubtedly, and in every case willing forfeit what the county prosecutor wants forfeited. It is essential that this practice by county prosecutors be prohibited.

Further, the deck is stacked against the marginalized criminal defendant because he or she is concerned not about the civil forfeiture lawsuit (money or property seized) but rather the criminal charges. Therefore, in many cases the county prosecutors, simply files the lawsuit, in Special Civil Part, obtains a default judgment because the owner of the property fails to file an answer to the complaint, and the county prosecutor wins the case and obtains the property by a default judgment. Again, it makes no economic sense for the defendant to attempt to retain an attorney to fight a U.S. Currency forfeiture complaint for \$500.00, when the cost of hiring an attorney is much more than that.

More Reform Is Needed

Now I would like to discuss the new law A4970.

The new law precludes the county prosecutor for obtaining U.S. Currency under \$1,000.00 or property less than \$25,000.00, if there is no criminal conviction. However, in practice this gives no relief to the defendant because the majority of the defendants will have a civil forfeiture default judgment entered against them way before the criminal case has concluded.

Because the county prosecutor has 90-days to file the civil forfeiture lawsuit after the seizure the civil forfeiture proceedings. If the Defendant does not file an answer within 35 days, a default will be entered against him or her almost immediately if the answer is filed.

Unless the Defendant retains an attorney, he or she will not be able to seek a stay (as the new law provides) in which the superior judge may stay the action pending the resolution of the criminal case. Further, if there is a criminal conviction the state can continue with the forfeiture.

Therefore, the new law gives no relief to the majority of the defendants who are forced to forfeit small, or sometimes large amounts of money, not related to the criminal offense, but taken from them at the time of the arrest, as a penalty for being arrested and charged.

If the Judge does not grant the stay, and the defendant files an answer, the Defendant is left with another dilemma for the defendant facing forfeiture. That being does he participate in asserting his 14th amendment due process right to seek a return

of his property, by giving up his 5th amendment right to remain silent which he has in his criminal case.

Although the new law gives the Superior Court judge the right to stay the proceedings, but the law says he may, not must. Further, if the defendant needs his automobile as the only transportation for himself or his family, he is in a bind. Does he divert scarce financial resources to defend he forfeiture by hiring a lawyer for this action, or does he devote his scarce financial resources to retain an attorney for his criminal case. The answer in most cases is that he will not defend the *in rem* forfeiture case, and he will lose his property by default.

This poses a bigger problem for the Defendant who is detained pretrial. Because of the bail reform act here in NJ a defendant is either released with conditions or is detained. In cases in which the defendant is detained because of prior record, or other factors, the defendant will be served with his forfeiture complaint while in jail. Again, without retaining private counsel or help from his family the property will be confiscated through a default judgment.

The new law gives some relief to innocent third party owners of the property in that the state must prove by clear and convincing evidence that the third-party had knowledge of or consented to any act or omission in which the forfeiture is based.

It is important to note, that neither the Office of the PD, or legal services will assist a defendant facing confiscation of his assets in a civil forfeiture action.

In summary much of the civil forfeiture issues leads us back the underlying problem that plagues our judicial system, that being, access to the courts for the economic disadvantaged.

It is without argument that the economic disadvantaged do not have access to the courts to defend these civil forfeiture actions, and the law must be changed to accommodate this sad reality.



P.O. Box 32159
Newark, NJ 07102
Tel: 973-642-2086
Fax: 973-642-6523
info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy
973-854-1714
ashalom@aclu-nj.org

TESTIMONY REGARDING CIVIL ASSET FORFEITURE IN NEW JERSEY
ALEXANDER SHALOM
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

BEFORE THE NJ ADVISORY COMMITTEE
TO THE U.S. COMMISSION ON CIVIL RIGHTS

November 19, 2020

Thank you to members of the advisory committee for the opportunity to testify today regarding problems with New Jersey's civil asset forfeiture practices. For the last decade, I have been a lawyer with the American Civil Liberties Union of New Jersey (ACLU-NJ).

Founded in 1960, the ACLU-NJ is the state's leading organization dedicated to defending and advancing civil rights and liberties. We are a non-profit, non-partisan organization with more than 40,000 members and donors across New Jersey.

One of my roles at the ACLU-NJ was supervising a law fellow who was working full time representing people in civil asset forfeiture cases. You've heard her name already – Liza Weisberg. As she described the civil asset forfeiture process to me, it looks nothing like justice.

It is true, as you've heard from some of the other speakers, that in theory, civil asset forfeiture empowers law enforcement authorities to deprive individuals of the ill-gotten profits or illicit instrumentalities of crimes.

In reality, civil asset forfeiture grants law enforcement authorities effective impunity to steal from the public to enrich their departments. In 2019, Liza and the ACLU of New Jersey issued an alarming [report on the use of civil asset forfeiture](#) in our state. The report reveals that our forfeiture system is failing all New Jerseyans – and especially those in low-income communities and communities of color.

As Liza explained to me, in most of the cases she worked on, like Mr. Burdette's, claimants won their money or property back. But those cases are the exceptions – not for having winning claims but for coming forward in the first instance to put the State to its burden of proof.

Claimants challenge forfeitures in just *three percent* of cases in New Jersey. Prosecutors count on winning default judgments. Between January and June of 2016, claimants went to court in only 50 of the over 1,860 cases initiated by county prosecutors in the state. Those 1,860 cases involved more than \$5.5 million in seized cash, 234 cars, and even a home.

It is neither an accident nor a surprise that so few people fight back. Most seizures take place in heavily policed, low-income communities. Of the 10 cities with the highest frequency of seizures in New Jersey, [eight are among the poorest in the state](#), falling within the bottom quartile in median income rankings. Often, just the court filing fees are prohibitive, let alone the cost of hiring a private attorney. Public defenders in New Jersey are generally barred from representing their clients in civil matters, and most legal services providers don't offer free assistance in forfeiture cases.

Let me give you one particularly troubling example from Hudson County, where the Prosecutor's Office engaged in a particularly unfair practice. The county routinely sued dozens of unrelated people in the same civil forfeiture lawsuit, depriving them of a fair opportunity to contest the seizures. In New Jersey, cases involving less than \$15,000 are brought in the Special Civil Part of the Law Division, a court that's friendlier to people without lawyers, where it costs under \$50 to respond to a lawsuit.

Rather than use this forum, the Hudson County Prosecutor's Office waited until it has enough seizure claims to total \$15,000, and then it brought one big lawsuit in the Law Division of the Superior Court, where people have to pay \$175 to respond to a lawsuit. For example, one ACLU-NJ client had to pay \$175 to challenge a seizure of \$171.

These suits included people who had never met each other, who encountered law enforcement on different days, in different cities. It violated New Jersey court rules, and it deprived people of due process by making them pay more to challenge a forfeiture than was taken in the first place. But – until the ACLU-NJ challenged the policy – it was the routine practice in Hudson County for years.

Even without that sort of troubling practice, the combined costs of litigation, including filing fees and counsel costs, frequently exceed the value of the seized property, so mounting a challenge is a losing proposition from the start.

A claimant who can overcome these financial barriers quickly faces an uphill legal battle. The government only needs to prove by a preponderance of the evidence – i.e., “more likely than not” – that assets are linked to criminal activity in order to permanently seize them, delivering a windfall to the initiating law enforcement agency. This standard applies even if claimants are never criminally charged or criminal charges against them are dismissed.

If police stopped you on the street, took the money from your wallet, and asked you to tell them exactly where, when, and how you got every dollar, could you? When challenging the seizure of their property, claimants have to justify every cent to their name. Accordingly, claimants face the exceedingly difficult task of proving a negative: that their money was not connected to a crime.

Several of the clients Liza worked with didn’t have bank accounts, making them particularly vulnerable to cash seizures. Police and prosecutors treated their possession of a large sum of cash as if it were a guilty act in itself. But carrying a few hundred dollars at a time is neither against the law nor a smoking gun. For many, it’s a month’s rent, a week’s wages, or a loan from a family member.

Take an example of another of Liza’s clients. In a blog post she wrote, she referred to him using the pseudonym Andrew. He was stopped by police outside his home in Newark after a pair of officers had arrested someone for buying a small amount of marijuana a few blocks away. When they called for backup, the officers shared a description of the seller: a Black man in dark clothing. The responding officers determined Andrew fit that description, as did presumably dozens of other people in the neighborhood. Andrew had no drugs or paraphernalia, but he did have about \$750 with him. When we provided the prosecutor with proof that he had received a monthly Social Security payment of \$780 just five days prior, the prosecutor asked skeptically, “and then it turned into cash?” Apparently, this alchemy – the kind an ATM or bank teller performs – was more far-fetched than Andrew’s innocence.

Opportunities for reforming civil asset forfeiture are as glaring as the biases and inequities that fuel it. Critics of this practice do not all fall on one side of the political spectrum. For example, Supreme Court Justice Clarence Thomas has questioned whether its roots in English customs law are “capable of sustaining, as a constitutional matter, the contours of modern practice.” He explained that “[t]his

system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.” More troubling still, these abuses disproportionately burden low-income communities and “other groups least able to defend their interests in forfeiture proceedings.”¹

Ultimately, civil asset forfeiture should end altogether. But in the meantime, decision-makers can take steps to curtail the worst abuses. New Jersey recently made great progress by mandating some transparency in the use of civil asset forfeiture. County prosecutors are now required to track and report information on seizures and forfeiture actions.

But there remain at least two reforms that should be undertaken immediately.

First, states like New Jersey can and must acknowledge that this system, for all practical purposes, operates as a form of punishment. As a result, *all* the protections afforded to criminal defendants should attach. There should be a right to counsel in every case, prosecutors should meet the criminal burden of proof “beyond a reasonable doubt,” and no forfeiture should take place absent of a criminal conviction.

Second, law enforcement should not directly profit from civil asset forfeiture. Instead, cash and proceeds from seized property should be deposited in the state general fund rather than funneled back into the coffers of the initiating agency or department. That would limit law enforcement incentives for aggressively pursuing forfeiture actions.

New Jerseyans deserve no less, and much more.

¹ *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting the denial of certiorari).

**New Jersey Advisory Committee to the
U.S. Commission on Civil Rights**



U.S. Commission on Civil Rights

For more information, please contact the Eastern Regional Office.

Contact: Ivy L. Davis
Eastern Regional Office–USCCR
U.S. Commission on Civil Rights
Washington, D.C.
Email: ero@usccr.gov
(202) 376-7533
