

Seizing Property: Civil Asset Forfeiture in South Carolina



A Report of the South Carolina
Advisory Committee to the U.S.
Commission on Civil Rights

December 2022

South Carolina Advisory Committee to the
U.S. Commission on Civil Rights

Letter of Transmittal

The South Carolina Advisory Committee issues this briefing report on civil asset forfeiture in South Carolina as part of its responsibility to study and report on civil rights issues in the state. This report was adopted by a unanimous vote on December 1, 2022.

Respectfully submitted,

Theodore Mauro,
Chair, South Carolina Advisory Committee

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

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states, territories, and the District of Columbia. These committees are composed of citizens who serve without compensation; they are tasked with advising the Commission of civil rights issues in their state/territory/district that are within the Commission's jurisdiction. Committees are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's/territory/district's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their state/territory/district.

SOUTH CAROLINA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS

Members of the Advisory Committee

Theodore Mauro, Chair
Pendleton

Mathieu Deflem
Columbia

Sue Berkowitz
Columbia

John Glover
Saint Helena Island

Walter Caudle
Columbia

Ebony Green
Columbia

Miles Coleman
Greenville

Mark Smith
Columbia

Daniella Ann Cook
Columbia

Dori Tempio
Columbia

Acknowledgments

The South Carolina Advisory Committee thanks all of the briefing participants for sharing their expertise and, in some cases, deeply personal stories on this most important issue. It also extends its appreciation to Patrick Williamson, JD, for his exceptional support of the work of the Advisory Committee.

Table of Contents

- Executive Summary6
- I. INTRODUCTION9
- II. BACKGROUND.....10
 - A. South Carolina’s Civil Asset Forfeiture Laws and Procedures10
 - B. Seizure Statistics and Record-keeping in South Carolina12
 - C. Equitable Sharing in South Carolina12
 - D. South Carolina Judicial Decisions and Legislative Initiatives Regarding Civil Asset Forfeiture ...14
- V. FINDINGS AND RECOMMENDATIONS16

Executive Summary

Civil asset forfeiture is a practice that allows law enforcement agencies to seize money or property—including bank accounts, real estate, and other personal property—if the person is suspected of being involved in criminal activity. Such seizures often take place regardless of whether the owner of the property has been convicted of—or is ever even charged with—committing a crime.

In South Carolina civil asset forfeiture has few procedural safeguards or meaningful limitations to protect the due process rights of the state’s residents. For example, South Carolina law enforcement agencies only need to show that there is probable cause that a crime has been committed in order to seize an individual’s property; the burden of proof then shifts to the property owner to prove their own innocence, by a preponderance of evidence, and thus prove their right to their own seized property.¹ Because this forfeiture process is civil in nature rather than criminal, individuals are not entitled to legal representation when seeking to regain possession of their property, leaving them to hire costly legal representation that is often times more expensive than the property that has been seized.

Civil asset forfeitures are also seemingly not driven by a public safety rationale, but rather by profit incentives for law enforcement agencies and individual employees. Common practice among agencies across the country and in South Carolina is to funnel seized funds and property into accounts accessible to the police department that seized it, allowing these agencies to use the property for their own benefit above and beyond the funding appropriated to them.

In addition to the shortcomings of the asset forfeiture system itself, the South Carolina Advisory Committee heard testimony that Black South Carolinians are disproportionately targeted by law enforcement agencies for civil asset forfeiture.² Although African Americans make up only 27 percent of the overall population of the state, they comprise 71 percent of all instances of asset forfeiture seizures in South Carolina.³

The Committee considered undertaking an investigation of civil asset forfeiture in 2020 but delayed because the South Carolina Supreme Court granted certiorari to a lower court ruling that held two sections of the South Carolina Code that permitted asset forfeiture were facially unconstitutional under both the Excessive Fines Clause and the Due Process Clause of the federal and state constitutions.⁴

¹ S.C. Code Ann. § 44–53–586(b); *see also* *Gowdy v. Gibson*, 391 S.C. 374 (2011) (noting that the State satisfied its initial burden of proof by establishing probable cause to seize the property forfeited and that the Petitioners did not meet their burden to show by a preponderance of the evidence that the property was innocently owned).

² *See generally* Robert Frommer, testimony before the South Carolina Advisory Committee to the U.S. Commission on Civil Rights, Hearing Transcript, Dec. 2, 2021, p. 4-10; Marian Williams testimony, Dec. 2 Hearing Transcript, p. 15-18; Alesia Rico Flores testimony, Feb. 3 Hearing Transcript; Allie Menegakis testimony, Feb. 3 Hearing Transcript; Susan Dunn testimony, Feb. 3 Hearing Transcript, p. 10-12

³ Robert Frommer, testimony before the South Carolina Advisory Committee to the U.S. Commission on Civil Rights, hearing, Dec. 2, 2021, transcript, p. 4.

⁴ S.C. CODE ANN. §§ 44-53-520, 530 (2018). Judge Steven H. John ruled that South Carolina’s civil forfeiture laws, which let the government “seize unlimited amounts of cash and other property when no crime has been committed,” run afoul of the U.S. and South Carolina Constitutions’ guarantees of due process and bans on excessive fines. *Richardson v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars (\$20,771.00) U.S. Currency*, No. 2017-CP-26-07411, 4-5 (S.C. Ct. C.P., Aug 28, 2019). Specifically, the circuit court concluded these two provisions facially violated (1) the Due Process Clause in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution and (2) the Excessive Fines Clause in the

The South Carolina Supreme Court heard oral arguments in January 2021.⁵ Because there was no ruling, the Committee began an examination of the issue in December 2021 and issued an [interim memorandum](#) in May 2022.⁶ The interim memorandum was released “due to the time-sensitive nature [of a proposed] a bill” on asset forfeiture being considered in the South Carolina General Assembly.⁷ The legislative effort to address this topic were not successful.

In September 2022, the South Carolina Supreme Court issued its opinion, reversing and remanding the lower court ruling, holding that the threshold for “finding a statute facially unconstitutional” was not met.⁸ The South Carolina Supreme Court “encourage[s] our circuit courts to continue very careful examination of the issues presented in civil forfeiture proceedings.” It also observed that “Of course, if the General Assembly believes our state's civil asset forfeiture laws should be amended to address the potential for abuse or be updated to align more closely with federal law, it may do so.”⁹

The South Carolina Supreme Court opinion leaves civil asset forfeiture as a permissible practice in the state. As the South Carolina Advisory Committee outlined in its May memorandum to the Commission, without proper procedural safeguards and little oversight of law enforcement agencies engaging in civil asset forfeiture, the due process rights of South Carolinians remain at risk.¹⁰ The state legislature has taken up bipartisan efforts to address some of these issues, but has thus far been unsuccessful in passing any legislation.

Because civil asset forfeiture necessarily includes seizures of personal property, affords citizens reduced procedural protections compared with criminal proceedings, and disproportionately impacts people of color, the Committee recommends that protective measures be put in place to ensure equal, equitable, and fair administration of justice.

Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. *Id.* at 2. In dismissing the action, the circuit court held sections 44-53-520 and 44-53-530 facially violated due process by placing the burden on the property owner to prove he is an innocent owner, institutionally incentivizing officials to pursue forfeiture actions, and failing to provide for judicial review or authorization prior to or subsequent to the seizure. *Id.* The circuit court denied the Solicitor's motion for reconsideration, and the Solicitor appealed. In this particular case, in addition to monies seized for drug transactions, law enforcement attempted to also seize the home of Rozina Jarvis. Jarvis was in her 80s and had lived in the same home since 1964. After criminal activity allegedly took place on her property, her ownership was imperiled, even though she was not implicated in the conduct.

⁵ Richardson v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars (\$20,771.00) U.S. Currency, No. 28113, 2022 S.C. Lexis 111 (Sept. 14, 2022).

⁶ The Committee called on the Commission to investigate asset forfeiture and called on the South Carolina legislature to include eight protections in legislation: 1. The process should be fair and transparent; 2. Due process protections must be built in; The burden of proof should be on the government, not citizens, and notice should be required; 4. Seizures should be limited to admissible evidence; 5. An innocent owner defense should be enacted; 6. Forfeitures should be limited by the excessive fines clause of the Eighth Amendment; 7. Reimbursement of attorney fees should be provided to the prevailing party; and 8. The right to a jury trial and to suppress illegally seized evidence should be provided.

⁷ South Carolina General Assembly, 124th Session, 2021-2022. Bill S. 70. To Enact the “Asset Forfeiture and Private Property Protection Act” to Amend Title 17 of the 1976 Code, Relating to Criminal Procedures, by Adding Chapter 32, to Provide for Asset Forfeiture and Private Property Protection Processes. https://www.scstatehouse.gov/sess124_2021-2022/bills/70.htm

⁸ Richardson v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars (\$20,771.00) U.S. Currency, No. 28113, 2022 S.C. Lexis 111 (Sept. 14, 2022).

⁹ *Id.*

¹⁰ Memo on Civil Asset Forfeiture in South Carolina (May 2022), <https://www.usccr.gov/reports/2022/memo-civil-asset-forfeiture-south-carolina>

I. INTRODUCTION

Ensuring the fair administration of justice and equal access to justice for every American have been priorities of the U.S. Commission on Civil Rights (“the Commission”) and its state advisory committees since the Commission’s establishment in 1957. In recent years, the practice of civil asset forfeiture has raised important concerns for the Commission about the fair and equal administration of justice.¹¹

Criminal asset forfeiture refers to the formal legal process by which law enforcement agencies seize—and then keep—property that was involved in criminal activity after a defendant has been convicted of a crime.¹² In contrast, civil asset forfeiture enables law enforcement to seize property that is merely suspected of having been involved in criminal activity, regardless of whether or not the owner of the property has been convicted of—or even charged with—committing a crime.¹³ In fact, a U.S. Supreme Court Justice recently noted 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.”¹⁴ At the federal level, there is also bipartisan support to limit the practice.

State civil asset forfeiture laws—and local law enforcement’s use of such laws—have also been the subject of significant public concern and growing criticism in recent years.¹⁵ In 2016, for example, the Michigan Advisory Committee to the U.S. Commission on Civil Rights issued a report on civil asset forfeiture in the State of Michigan.¹⁶ In examining the use of civil forfeiture in their state, the Michigan Advisory Committee heard testimony from elected officials, law enforcement personnel, academic and legal professionals, community advocates, and other impacted individuals. Through this testimony, the Michigan Advisory Committee identified “a number of concerns involving the potential for disparate impact, including restrictions on due process, limited judicial oversight, a lack of right to counsel, and financial incentive for law enforcement to utilize a wide range of discretion in targeting property forfeitures.”¹⁷ Since the release of the Michigan Advisory Committee’s report, Advisory Committees in Tennessee, Georgia, Massachusetts, and Kentucky have examined or are examining civil asset forfeiture in their respective states and identified similar concerns.

South Carolina’s civil asset forfeiture law lacks many procedural safeguards that are commonplace in other states. For example, in South Carolina, law enforcement agencies must only show that there is probable cause to seize an individual’s property, after which the burden of proof is on the property owner to prove their own innocence, by a preponderance of evidence,

¹¹ U.S. Commission on Civil Rights, *The U.S. Commission on Civil Rights Disapproves of the Department of Justice’s Civil Asset Forfeiture Policy*, August 18, 2017, https://www.usccr.gov/press/2017/Statement_08-18-2017_Forfeiture.pdf.

¹² U.S. Department of Justice, “Types of Federal Forfeiture,” February 1, 2017, <https://www.justice.gov/afp/types-federal-forfeiture>.

¹³ *Ibid.*

¹⁴ *Leonard v. Texas*, 580 U.S. 1178 (2017) (Thomas, J. dissenting).

¹⁵ *See, e.g.*, U.S. Commission on Civil Rights, *Michigan Advisory Committee to the U. S. Commission on Civil Rights Releases Report: Civil Rights and Civil Asset Forfeiture in Michigan*, Oct. 5, 2016, http://www.usccr.gov/press/2016/MI_Civil%20Forfeiture%20News%20Release.pdf.

¹⁶ *Ibid.*

¹⁷ Michigan Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Civil Asset Forfeiture in Michigan*, October 2016, http://www.usccr.gov/pubs/Michigan%20Civil%20Forfeiture%20_2016.pdf.

and thus prove their right to their own seized property.¹⁸ Additionally, there is a powerful profit incentive built into forfeiture laws in the state, both for law enforcement agencies and for individual employees.¹⁹ Seized funds primarily funnel into special accounts accessible only to the police and prosecutors who seized the property.²⁰ Forfeiture activity increases during times of fiscal stress and decreased government funding, which suggests that agencies rely on property seizures from citizens to fill the gaps in their budgets.²¹

In 2022, the South Carolina Advisory Committee to the Commission (“the SC Committee”) voted to examine the civil rights implications of South Carolina’s civil asset forfeiture laws. Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.²² Asset forfeiture is also implicated in the Fourth Amendment prohibition on unreasonable seizures; the Fifth Amendment’s prohibition on takings of property for public use without just compensation; the Fourteenth Amendment’s guarantee of due process of law; and the Fourteenth Amendment’s mandate that states afford persons within their jurisdictions equal protection of the laws. As civil asset forfeiture necessarily includes seizures of personal property,²³ affords citizens reduced procedural protections compared with criminal proceedings,²⁴ and disproportionately impacts people of color,²⁵ the SC Committee specifically sought to examine issues regarding the fair and equal administration of justice implicated by the use of civil asset forfeiture in South Carolina.

II. BACKGROUND

A. South Carolina’s Civil Asset Forfeiture Laws and Procedures

Civil asset forfeiture is a legal process that permits law enforcement officials to seize and retain private property if they suspect that the property is related to criminal activity. Although civil forfeiture is contingent upon suspected criminal conduct, civil forfeiture proceedings are

¹⁸ Robert Frommer, testimony before the South Carolina Advisory Committee to the U.S. Commission on Civil Rights, hearing, Dec. 2, 2021, transcript, p. 4.

¹⁹ Frommer testimony, Dec. 2 Hearing Transcript, p. 3 and 16; Marian Williams testimony, Dec. 2 Hearing Transcript, p. 15; Allie Menegakis testimony, Feb. 3 Hearing Transcript, p. 8; Susan Dunn testimony, Feb. 3 Hearing Transcript, p. 10.

²⁰ Frommer testimony, Dec. 2 Hearing Transcript, p. 3.

²¹ Frommer testimony, Dec. 2 Hearing Transcript, p. 16.

²² The Civil Rights Act of 1964, 88 Pub.L. No. 352, § 601, 78 Stat. 241.

²³ Christopher Ingraham, *Law enforcement took more stuff from people than burglars did last year*, Washington Post (Nov. 23, 2016), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm_term=.d0c1f41ee31c (“In the United States, in 2014, more cash and property transferred hands via civil asset forfeiture than via burglary.”); Alok Ahuja, *Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment*, 5 Yale L. & Pol’y Rev. 428, 433 (1987).

²⁴ Editorial Board, *Forfeiture without due process*, Washington Post, Jan. 2, 2012, https://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP_story.html?utm_term=.1f3704d71e87 (“there is something very wrong when a law enforcement officer can simply take someone’s money while providing no evidence of illicit activity”).

²⁵ 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*, Apr. 1, 2016, <https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream/> (“Although civil asset forfeiture affects people of every economic status and race, a growing array of studies indicates that low-income individuals and communities of color are hit hardest. The seizing of cash, vehicles, and homes from low-income individuals and people of color not only calls law enforcement practices into question, but also exacerbates the economic struggles that already plague those communities.”)

considered civil actions against the property itself, rather than criminal actions against a property owner. Consequently, the constitutional protections that traditionally apply in criminal proceedings—such as the right to an attorney, the right to a jury, and the requirement that the government establish proof of guilt beyond a reasonable doubt—do not attach.²⁶

Civil forfeiture initially gained prominence in the 1970s and 1980s as a means of targeting drug dealers by enabling law enforcement to seize both their criminal proceeds and the property that they used to further illegal activity. At that time, the federal Comprehensive Drug Abuse and Prevention Control Act of 1970 permitted law enforcement to seize illegal narcotics and the equipment that suspected criminals used to manufacture or transport them.²⁷ Since then, however, law enforcement’s use of civil forfeiture has expanded dramatically at both the federal and state levels to enable the use of civil forfeiture in virtually all cases of suspected criminal activity.

Significantly, Congress also enacted a law permitting “equitable sharing” with state and local law enforcement, incentivizing local law enforcement agencies to participate in federal forfeiture cases by permitting local law enforcement to retain a substantial portion of federally forfeited proceeds.²⁸ As a consequence, the government often seizes more property than criminals.²⁹

Critically, states have also enacted their own forfeiture statutes to permit property to be forfeited in non-federal cases. In South Carolina, civil asset forfeiture law states that property can be seized if law enforcement has probable cause to believe that the property has been attained by illegal means, or used (directly or indirectly) for criminal activity, including (but not limited to) gambling, human trafficking, gang activity, larceny, obscenity, animal fighting, or the use or sale of drugs.³⁰ Unfortunately, in practice, this broad definition allows for considerable abuse, as the Committee heard in the testimony of Isiah Kinloch. The victim of a home invasion, Mr. Kinloch’s rent money was confiscated by the police as they investigated the crime committed against him, after the police found a small amount of marijuana was found in his home.³¹

Once property is seized, it goes through forfeiture proceedings, which determine whether the property should be returned to the owner or forfeited. However, the process of fighting forfeiture can be more expensive than the value of the property, especially when small sums of money are seized. Furthermore, because these proceedings are considered civil and not criminal cases, the property owner has no right to an attorney, and because of the high cost and small reward of these cases, it can be a challenge to even find a private attorney willing to take them.³²

²⁶ Frommer testimony, Dec. 2 Hearing Transcript, p. 3.

²⁷ 21 U.S.C. § 881, at: <http://www.deadiversion.usdoj.gov/21cfr/21usc/881.htm> (last accessed September 20, 2016).

²⁸ The Comprehensive Crime Control Act, Pub. L. No. 98–473, § 301, 98 Stat. 1837 *et seq* (1984). *See also* U.S. Department of Justice; (“The Fund”), available at: <http://www.justice.gov/afp/fund> (last accessed September 20, 2016).

²⁹ In 2014, burglars stole \$3.9 billion worth of property whereas during that same time period, U.S. law enforcement netted \$4.5 billion from Americans through civil asset forfeiture.

https://www.armstrongeconomics.com/international-news/north_america/americas-current-economy/police-civil-asset-forfeitures-exceed-all-burglaries-in-2014/

³⁰ South Carolina Sheriff’s Association, “Asset forfeiture guidebook: A guide to civil asset forfeiture in South Carolina,” pp. 8-13. Updated Oct. 16, 2019 (hereafter “S.C. Sheriff’s Guidebook”)

³¹ Isiah Kinloch, testimony before the South Carolina Advisory Committee to the U.S. Commission on Civil Rights, hearing, Mar. 3, 2022, transcript, pp. 1-6.

³² Menegakis testimony, Feb. 3 Hearing Transcript, p. 4.

Thus, many property owners allow for the forfeiture of their property by signing a consent order. Consent orders have some built-in protections—they must be signed by the owner, any involved law enforcement agencies, lawyers, or interested parties, such as lienholders, and then must be approved by a judge.³³ Despite this, consent orders are another area for potential abuse by law enforcement agencies, who can seize cash or other valuables in targeted traffic stops and tell the property owner to sign a consent order on the spot, denying them any chance for due process.³⁴

B. Seizure Statistics and Record-keeping in South Carolina

Between 2014 and 2016, South Carolina law enforcement agencies seized and kept more than \$17 million from citizens.³⁵ Over half of the cash seizures were for less than \$1,000 and one-third were for less than \$500.³⁶ This means the seizures were not taken from drug kingpins, as the statutes are often intended, but instead from everyday citizens. The SC Committee heard testimony from Richland County Sheriff Leon Lott that some departments target everyday citizens in South Carolina by “annex[ing] a part of an interstate and us[ing] that as a cash cow to seize money.”³⁷ Importantly, between 2014 and 2016, nearly half of those who had property seized were ultimately not convicted of a crime. In fact, in approximately 20 percent of the cases, the individuals were never even charged.³⁸

Alarming, the evidence strongly suggests that Black residents are disproportionately targeted; Sheriff Lott of Richland County said that in his experience minority communities are “going to be stopped more” and have less access to the justice system to get their seized property back.³⁹ The vast majority—71 percent—of forfeiture victims in South Carolina are Black, even though African Americans comprise only 27 percent of the overall population.⁴⁰

Asset forfeiture can be very difficult to track in South Carolina, due to inadequate record-keeping and a lack of transparency.⁴¹ Law enforcement agencies do not adhere to uniform practices of reporting, creating a piecemeal system that is difficult to hold accountable.⁴² South Carolina does not report the types of properties forfeited or the value of property forfeitures, nor does it report how forfeiture funds are spent.⁴³

C. Equitable Sharing in South Carolina

³³ S.C. Sheriff’s Guidebook, p. 23.

³⁴ Lott testimony, Apr. 7 Hearing Transcript, p. 2.

³⁵ Menegakis testimony, Feb. 3 Hearing Transcript, p. 6.

³⁶ Nathaniel Cary, “Inside look: How SC cops swarm I-85 and I-26, looking for 'bad guys',” *Greenville News*, <https://www.greenvilleonline.com/in-depth/news/2019/02/03/operation-rolling-thunder-sc-civil-forfeiture-interstate-95-interstate-26/2458314002/>.

³⁷ Lott testimony, Apr. 7 Hearing Transcript, p. 4.

³⁸ Nathaniel Cary, “Inside look: How SC cops swarm I-85 and I-26, looking for 'bad guys',” *Greenville News*, <https://www.greenvilleonline.com/in-depth/news/2019/02/03/operation-rolling-thunder-sc-civil-forfeiture-interstate-95-interstate-26/2458314002/>.

³⁹ Lott Testimony, Jun. 13 Hearing Transcript, p. 7.

⁴⁰ Robert Frommer, testimony before the South Carolina Advisory Committee to the U.S. Commission on Civil Rights, hearing, Dec. 2, 2021, transcript, p. 5.

⁴¹ Menegakis testimony, Feb. 3 Hearing Transcript, p. 8; Rico Flores testimony, Feb. 3 Hearing Transcript, p. 3.

⁴² Williams testimony, Dec. 2 Hearing Transcript, p. 10.

⁴³ L. Knepper, *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 3rd Edition, Institute for Justice, Dec. 2020, pp. 141. <https://ij.org/report/policing-for-profit-3/>.

Civil asset forfeitures can be affected under either state or federal law. If law enforcement agencies in South Carolina wish to seize and forfeit assets under the state’s civil forfeiture regime, they must comply with all state laws regarding the manner in which the forfeiture takes place, including the standards of evidence required to forfeit property and how the proceeds of forfeitures may be spent.

However, civil asset forfeiture can also proceed under federal law through a program known as “equitable sharing.” Equitable sharing allows state and federal law enforcement authorities to share the proceeds of a forfeiture that results from a federal investigation or prosecution.⁴⁴ State law enforcement agencies that “directly” participate in a federal investigation or prosecution where an asset is forfeited can claim a share of the proceeds from the forfeiture. Asset forfeitures under the equitable sharing program are subject to federal law.⁴⁵

Seizures made as part of federal equitable sharing take place under a civil rather than criminal standard of proof.⁴⁶ Authorities do not need to charge or convict an individual of a crime. They must only show by a preponderance of evidence that the property is subject to federal forfeiture.⁴⁷ As with most state laws regarding civil forfeiture, this civil standard is far less rigorous than the criminal standard of proof that requires law enforcement to prove guilt beyond a reasonable doubt.

Equitable sharing takes place along one of two pathways. State officials can seize an asset locally and turn it over to federal agencies for “adoption.” Federal agencies can decide to “adopt” an asset in circumstances “where the conduct giving rise to the seizure is in violation of federal law and where federal law provides for forfeiture.”⁴⁸ Alternatively, state law enforcement authorities can seize an asset and claim a part of forfeiture proceeds where they assist the federal government as part of a joint state/federal investigation.⁴⁹ For example, state and federal agencies might work together on investigations and asset seizures as part of a joint task force.

According to the Institute for Justice, up to 80 percent of proceeds from asset forfeitures are recouped by state and local law enforcement, leaving the remainder to be claimed by the federal government. The Institute reports that the use of the equitable sharing program has grown rapidly since its introduction in the mid-1980s. Between 2004 and 2014, for example, the equitable sharing program experienced a 17 percent increase in the rate of state and local agency participation, with over 3,000 agencies participating in the program in 2014. From 2000 to 2013,

⁴⁴ Equitable sharing is a part of the Department of Justice’s Asset Forfeiture Program. U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, April 2009, pp. 3, 11, available at <https://www.justice.gov/criminal-afmls/file/794696/download>.

⁴⁵ The Department of Justice’s Asset Forfeiture Program and equitable sharing were authorized through the Comprehensive Crime Control Act 1984 (as amended), Pub. L. No. 98–473, §301, 98 Stat. 1837 *et seq* (1984). For further detail on the Asset Forfeiture Fund, *see* U.S. Department of Justice, *The Fund*, available at <http://www.justice.gov/afp/fund> (last accessed Dec. 2, 2017). Broadly, the goal of this policy lay in seeking to seize the property and profits arising out of drug-related and white-collar criminal conduct. The law could re-distribute the profits of criminal enterprises to the victims of crime and to law enforcement agencies. U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009), pp. 1-3, <https://www.justice.gov/criminal-afmls/file/794696/download>.

⁴⁶ *Id.*

⁴⁷ 18 U.S.C. § 983(c)(1).

⁴⁸ U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, April 2009, p. 6; U.S. Department of Justice, *Policy Guidance on the Attorney General’s Order on Federal Adoption and Forfeiture of Property Seized by State and Local Law Enforcement Agencies, Policy Directive 17-1*, Jul. 19, 2017, available at <https://www.justice.gov/opa/press-release/file/982616/download>.

⁴⁹ *Id.*

annual payments to state and local law enforcement more than tripled, growing from \$199 million in the year 2000 to \$643 million in 2014.⁵⁰

On account of these generous disbursements to state and local law enforcement, the equitable sharing program offers compelling financial incentives for state agencies to pursue civil asset seizures under federal law. It can also afford state law enforcement the choice of pursuing forfeiture under either state or under federal law. If state law does not provide a basis for asset forfeiture and federal law does or where the standards of seizure are more relaxed under federal rather than under state law, asset forfeiture under the equitable sharing program holds particular usefulness and appeal for state law enforcement agencies.

From 2000 to 2019, South Carolina law enforcement agencies collected \$103 million from federal equity sharing.⁵¹

D. South Carolina Judicial Decisions and Legislative Initiatives Regarding Civil Asset Forfeiture

The legal landscape of civil asset forfeiture in South Carolina has shifted in recent years, with judicial action on the issue invalidating the practice in a portion of the state. Further, although there have been proposed bipartisan reform efforts in recent legislative sessions, the State General Assembly has thus far failed to reform the state's civil asset forfeiture laws.

i. Judicial Decisions

In the 2019, the 15th Judicial Circuit in the Court of Common Pleas ruled in *Richardson v. \$20,771* that the state's civil asset forfeiture provisions are unconstitutional under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution and sections 3 and 15 of the S.C. Constitution.⁵² Citing these provisions, the court held the law to be unconstitutional because of the (a) excessive fines and fees the practice imposes, and (2) the lack of due process protections afforded to South Carolinians subjected to forfeiture.⁵³ Although this decision is only applicable to the 15th Circuit, it has since been appealed to the state's Supreme Court, which heard oral arguments on the matter in January of 2021.

a. Excessive fines and fees in violation of the Eight Amendment to the U.S. Constitution and §15 of the South Carolina Constitution

The Eighth Amendment to the U.S. Constitution, applicable to the states under the 14th Amendment's Due Process clause, limits the government's power to extract payments as

⁵⁰ D. Carpenter, *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2nd Edition, Institute for Justice, Nov. 2015, pp. 25-30.

⁵¹ L. Knepper, *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 3rd Edition, Institute for Justice, Dec. 2020, pp. 140. <https://ij.org/report/policing-for-profit-3/>.

⁵² *Richardson v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars (\$20,771.00) U.S. Currency*, No. 2017-CP-26-07411, 4-5 (S.C. Ct. C.P., Aug 28, 2019), <https://publicindex.sccourts.org/Horry/PublicIndex/PIImageDisplay.aspx?ctagency=26002&doctype=D&docid=1567016063507-983&HKey=8410957535484798510610468981141081011121001091215674977285102761039711898834357679956547352996611785>.

⁵³ *Id.*

punishment for an offense.⁵⁴ Similarly, Article 1 § 15 of the South Carolina Constitution prohibits the imposition of excessive fines.⁵⁵

In *Richardson*, the 15th Circuit Court found both federal and state constitution prohibitions against excessive fines to be violated by the state's civil asset forfeiture laws because they permit seizure of unlimited amounts of cash and property without any regard to the nature of the underlying offense.⁵⁶ For example, the state's civil asset forfeiture scheme would permit seizure of millions of dollars from an individual even where the underlying alleged crime carries a minimal maximum fine. Further, such unfettered authorization to seize exists even where no crime is ultimately found to have been committed.

b. Due process issues in violation of the Fifth and Fourteenth Amendments and §3 of the South Carolina Constitution

The court in *Richardson* also found the state's civil asset forfeiture provisions violate federal and state constitutional guarantees of due process. First, the court reasoned that seizure is permitted prior to the defendant being convicted of or even charged with a crime and may even occur when the government has not provided any meaningful evidence that the property relates to a crime. Although citizens may then regain their property through post-seizure judicial processes, such a system places the burden of proof on the defendant to prove their innocence rather than the government proving their guilt. The court in *Richardson* noted that, although there are some instances in which the burden of proof may be placed on a defendant in a criminal case, those circumstances only arise when the government first proves some wrongful act by the defendant unlike the civil asset forfeiture laws in South Carolina.⁵⁷

Second, the court held that the structure of South Carolina's civil asset forfeiture laws violate guarantees of due process by improperly incentivizing forfeiture. In South Carolina, agencies are permitted to spend as much forfeiture income as they bring in. This, the court held, creates the realistic possibility that the forfeiture programs will distort the judgement of the seizing agencies, improperly incentivizing them to seek out opportunities to seize assets. Finally, the court found the asset forfeiture laws to violate guarantees of due process by failing to afford pre- or post-seizure hearings to determine if probable cause existed to seize the assets.⁵⁸

ii. Legislative Action

The South Carolina General Assembly has made several attempts to reform asset forfeiture in recent legislative sessions without success. The first reform effort came in 2019 following an investigative series published in *The Greenville News* highlighting the state's broken and discriminatory asset forfeiture scheme.

In 2021, a bipartisan group of Members of the South Carolina General Assembly renewed reform efforts and introduced H. 3619, a bill to amend the state's asset forfeiture laws by (1) moving litigation involving seized assets from the civil-court system to criminal courts; (2) banning cash and property seizures in cases that do not result in a criminal conviction; (3) ending

⁵⁴ *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019).

⁵⁵ S.C. Const. Ann. Art. 1 § 15.

⁵⁶ *Richardson v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars (\$20,771.00) U.S. Currency*, No. 2017-CP-26-07411, 4-5 (S.C. Ct. C.P., Aug 28, 2019),

⁵⁷ *Id.*

⁵⁸ *Id.*

the practice of roadside asset seizures; and (4) setting minimum forfeiture thresholds of \$500 cash or \$2,500 for vehicles or other types of property.⁵⁹

On May 12, 2022, the regular session of the South Carolina General Assembly adjourned without further action being taken on this bill. While the future of reform sits in limbo, South Carolinians—primarily Black, male South Carolinians—continue to be subjected to the constitutionally dubious practice of asset forfeiture in the state.

V. FINDINGS AND RECOMMENDATIONS

Based on the testimony received, the SC Committee makes the following findings and recommendations:

Findings

Civil asset forfeiture does not accomplish its intended purposes of defunding organized crime, weakening criminal cartels, and reducing illicit drug use.

- In South Carolina between 2014 and 2016, over half of seizures were for less than \$1,000 and one-third were for less than \$500,⁶⁰ seizure amounts that are not indicative of bankrupting large drug kingpins.
- Further, a study conducted by the Institute of Justice found that, in a review of asset forfeiture data, national measures for drug use showed no systematic association with forfeiture revenues.⁶¹
- The SC Committee heard testimony that some departments expressly annex portions of interstates for the purpose of pulling South Carolinians over and seize assets.⁶² This practice is likely motivated by the ability of departments to use seized assets in department budgets.

South Carolina’s civil asset forfeiture laws disproportionately impact communities of color, exacerbating existing economic inequities.

- Those targeted for forfeiture in South Carolina are overwhelmingly Black. Despite making up only 27 percent of the state’s overall population, 71 percent of forfeitures are of property belonging to Black South Carolinians.⁶³

Current civil asset forfeiture laws in South Carolina create impermissible profit incentives for seizing law enforcement agencies.

- In South Carolina, law enforcement agencies are permitted to spend as much forfeiture revenue as they generate, with few limitations on uses of these funds.
- National studies have indicated that civil asset forfeiture increases during times of fiscal stress on state and local governments,⁶⁴ such as those experienced by localities across the country during the COVID-19 pandemic. This likely results in constitutional violations of

⁵⁹ H.R. 3619, 2021 Leg., 124th Sess. (S.C. 2021).

⁶⁰ Menegakis testimony, Feb. 3 Hearing Transcript, p. 6.

⁶¹ <https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf>

⁶² Lott testimony, Apr. 7 Hearing Transcript, p. 4.

⁶³ Frommer testimony, Dec. 2 Hearing Transcript, p. 5.

⁶⁴ <https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf> at pg. 7.

due process by improperly incentivizing law enforcement to dubiously seize property for the financial and pecuniary interests of law enforcement agencies rather than permissible purposes under current civil asset forfeiture laws.

Civil asset forfeiture in South Carolina lacks limitations to avoid abuse, provide for oversight of seizing authorities, and protect the federal and state constitutional rights of due process.

- Notably, South Carolina law does not require there to be a criminal conviction for a seizure to occur, rather there need only be probable cause that the property has been obtained through illegal means before seizing.
- Although a post-seizure hearing is typically held to determine if the property should be returned to the owner, contesting a seizure is typically more expensive than the value of the property.
- Further, because such hearings are civil rather than criminal proceedings, those who do wish to seek to reclaim their property are not entitled to legal representation.

Civil asset forfeiture in South Carolina violates state and federal constitutional prohibitions on excessive fines and fees.

- Importantly, there is no limitation to the amount of assets can be seized under state law, so long as there is probable cause they have been obtained by illegal means.
- Property can be seized without regard to the proportionality of the underlying alleged offense and is not contingent on any finding that a crime has been committed, subjecting South Carolinians to costly punishment often for no crime at all.

Federal equitable sharing has exacerbated the harms caused by civil asset forfeiture in the state and may limit the effectiveness of state-specific reforms to civil asset forfeiture laws.

- Regardless of state law, state and local law enforcement agencies are entitled to “equitable sharing”—a practice that permits state and local agencies to share in the proceeds of property seized locally but under federal law or as part of a joint task force or investigation with the federal government.
- A study done by the Institute of Justice found that “states with the lowest financial incentives and greatest protections for property owners took in twice as much equitable sharing money per agency as agencies in states with the highest incentives and poorest protections,”⁶⁵ suggesting that state agencies make greater use of equitable sharing when their state civil asset forfeiture authority is limited. From 2000 to 2019 in South Carolina, nearly \$103 million was collected by state law enforcement agencies through equitable sharing.⁶⁶

Recommendations

The legislature should amend the procedural requirements for civil asset forfeiture to protect the federal and constitutional rights of South Carolinians. Such amendments should include:

- Moving seizure proceedings from civil to criminal court; and
- Requiring a criminal conviction prior to seizure of property; and
- Providing for the reimbursement of attorney’s fees for prevailing property owners in seizure proceedings; and

⁶⁵ <https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf>

⁶⁶ <https://ij.org/report/policing-for-profit-3/>

- Requiring the amount of property seized be proportional to the underlying crime in accordance with federal and state constitutional prohibitions on excessive fines and fees; and
- Limiting seizures to admissible evidence.

The legislature should amend civil asset forfeiture laws to remove incentives for law enforcement agencies to seize assets. Such amendments should include strict limitations on the permissible uses of seized assets by law enforcement agencies.

Oversight and transparency initiatives should be adopted to prevent abuse of civil asset forfeiture laws. Disclosures such as inventory lists of seized items, amounts seized by agency, and funds obtained through federal equitable sharing would enable more effective oversight.

The General Assembly should require a statewide annual reporting process be developed that includes a searchable public database of information detailing which agency or entity seized the assets; the geographic location where the seizure took place; and from whom these assets were seized (including age, gender, race), including the circumstances that led to these assets being seized and a report of the expenditures of such funds. This information should be provided in a report to the Legislature annually in September – two months after the end of the fiscal year.